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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD and PAMELA SCHMIDT,

Petitioners,

v.

OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MICHAEL P. FARRIS
President
Home School Legal Defense Association
731 Walker Road
Suite E2
Great Falls, VA 22066
(703) 759-7577
Attorney for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

1. Are criminal defendants precluded from attacking the constitutionality of a regulatory statute when they are prosecuted for failure to obtain government approval under said statute?

2. Is Ohio law void for vagueness, thereby violating the Due Process Clause, by granting local school superintendents the right to permit or deny a request to home school a child if in his unfettered and undefined discretion the parent is "qualified" to teach?

3. Does Ohio law violate the Due Process Clause by yielding a decision concerning the exercise of fundamental rights to a person with a financial stake in the outcome of the decision?

4. Is a criminal prosecution for the exercise of one's religious beliefs sufficient to demonstrate a "burden" under this Court's Free Exercise tests?

PARTIES

Petitioners are Richard Schmidt (OH. S. CT. No. 86-263) and Pamela Schmidt (OH. S. CT. No. 86-263). Respondent is the State of Ohio.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD and PAMELA SCHMIDT,

Petitioners,

v.

OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on March 25, 1987.

OPINIONS BELOW

The opinion of the Ohio Supreme Court

was published at 505 N.E.2d 267. It appears in the appendix beginning at 1a. The written decision of the Seventh Appellate District for Columbiana County, Ohio, was entered on December 27, 1985. It is unpublished. It appears beginning at 25a in the appendix. The findings of fact and conclusions of law by the Juvenile Court of Columbiana County were entered on April 8, 1985. They are unpublished. They appear in the appendix starting at 40a.

JURISDICTION OF THIS COURT

Petitioners respectfully show the following as the grounds upon which the jurisdiction of this Court is invoked:

(i) This case seeks review of a decision of the Supreme Court of Ohio filed on March 25, 1987. This is a criminal case (truancy).

(ii) An order denying petitioners' timely

motion for rehearing in that court was entered on May 6, 1987.

(iii) Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

First Amendment to the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Fourteenth Amendment to the Constitution of the United States

. . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Ohio Revised Code § 3321.04 (A) (2)

> (A) The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the school year upon satisfactory showing of either of the following facts:

> (2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of the superintendent, require. . . .

Statement of Facts

Richard and Pamela Schmidt, residents of Columbiana County, Ohio, have three children, one of whom, Sara, had reached compulsory school age at the time this proceeding commenced. Her birthday is January 11, 1978. Sara has never been enrolled in a public school, but was enrolled in the Winchester Christian Academy, in Columbus, Ohio, in August, 1984. She was enrolled in the Academy at all times relevant to this criminal proceeding.

The Winchester Christian Academy is a private, non-chartered, non-tax-supported school meeting the Ohio minimum standards for such schools as set forth in the Ohio

Administrative Code, §3301-35-08, (A)-(H). Sara is receiving instruction at home from her parents through curriculum and a program of study and testing provided by Winchester Christian Academy. Dr. James Moody is the chief administrative officer of Winchester Christian Academy and has approved Sara for his instructional program.

The Academy carefully scrutinizes parents applying for their home school program, tests the children, provides Christian curriculum, requires daily progress reports from those families accepted and insists upon strict accountability by the parents.

Dr. Moody testified that the Schmidts were submitted to all the above procedures and strictly adhered to the Academy's requirements. As a result, the child progressed rapidly, according to

Vivian Ferrante, the main teacher monitoring Sara for the Academy.

It was stipulated that the Schmidts religious beliefs concerning their children's education were sincerely held. They are born-again Christians who adhere to a literal interpretation of the Bible.

The Schmidts articulated three basic reasons as to why they chose to home school and all three are religiously based. These reasons are: (1) they have faith in God and belief in the Bible as God's infallible, inspired Word, (2) as a result, the Schmidts believe they are bound by the Bible's commands to parents to personally train and teach their children according to God's principles, and (3) the public school materials and system present a view of the world which is contrary to their religious beliefs as parents.

Ohio law specifically permits home schooling if the child is excused from attendance by the local superintendent of the public schools. Ohio Rev. Code § 3321.04(A)(2).

The Schmidts did not seek approval from their local superintendent for two reasons. First, at the time of commencing their home schooling they believed that they were in compliance with the law. They understood that the Ohio Department of Education had issued an informal opinion that schools such as Winchester Christian Academy could legally supervise home schooling satellite programs like the one employed by the Schmidts.

Dr. Moody testified that the plan of instruction was submitted to the Ohio Department of Education which confirmed the Winchester Christian Academy's auth-

ority to approve home school programs. According to a letter dated October 15, 1984, Gene Wenger of the Ohio State Department of Education stated that:

> The Winchester Christian Academy of Canal Winchester, Ohio, operates within the provisions of Section 3301-35 of the Administrative Code. Officials of the Academy have the authority to grant permission for home instruction for children who are properly enrolled in their school.

The Department changed its view of this issue subsequent to trial and held that Ohio law permitted only the public school superintendent to excuse children for home instruction. All three levels of Ohio courts hearing this issue of state law concurred with the latter view of the Ohio Department of Education.[1]

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[1]The Schmidt's contended at all levels that Ohio law should be construed consistent with the Department of Education's original position, that is that religious schools operating legally under Ohio law could supervise home school programs. This is obviously an issue of

But at the time the Schmidt's began their program of home instruction, they believed, in reliance upon the view articulated by the Ohio Department of Education, that they were in fact in compliance with Ohio law.

The second reason that the Schmidts did not seek the approval of the local school superintendent was that they believe that to submit their curriculum and instructional materials to the control of a public school superintendent who works in an environment which necessarily excludes God and His teachings from instruction to the children, would result in excessive restriction on their religious duty to integrate God's Word with their child's instruction.

On September 25, 1984, Roger Stiller,

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state law which is not presented to this Court.

the local superintendent, wrote a letter to the Schmidts stating that they must seek his approval for home schooling and meet his standards. He also wrote in his letter that in order for the Schmidts to be "qualified" to teach their children, they must qualify for a teaching certificate under the rules of the State Department of Education. Superintendent Stiller also demanded that the Schmidts immediately enroll their child in his public school while they sought approval.

On October 4, 1984, Superintendent Stiller sent another letter stating that the Schmidts were in violation of the compulsory attendance law. Eight days later, Roger Stiller filed a complaint in the Columbiana County Court of Common Pleas, charging the Schmidts with twenty counts of failing to send their child to school. Even though the Schmidts had

several conferences with him, he pressed charges because they did not enroll Sara in the public school.

STATEMENT OF PROCEEDINGS

This matter was tried beginning February 28, 1985, before the Honorable Charles Pike, Judge of the Court of Common Pleas, Juvenile Division, Columbiana County, Ohio. Petitioners challenged the constitutionality of Ohio Rev. Code § 3321.04 (A) (2) and made other state law arguments. By motions, arguments, briefs, and by the submission of proposed findings of fact and conclusions of law, petitioners argued that this section of Ohio law violates the Free Exercise Clause of the First Amendment. Petitioners also contended that granting the local superintendent of schools the authority to approve or deny a home school

request at his own discretion violated the standards of the Due Process Clause. These arguments were rejected by the trial court in its findings of fact and conclusions of law. See App. at 40a-73a. The trial court merely adopted verbatim the findings and conclusions proposed by the prosecuting attorney. App. at 38a-39a. The central holding of the trial court was that substantive constitutional arguments could not be raised by the petitioners because they had not sought approval from the local superintendent of schools. App. at 44a, 64a.

Mr. and Mrs. Schmidt were both found guilty and each fined twenty dollars for each of the twenty counts against them, for a total of $400 per person. They were also required to place Sara in an approved public school or private school and required to post a $100 bond each for

guarantee of obedience to this requirement. This portion of the order requiring Sara to be enrolled in an approved institutional school has not been enforced during the course of these proceedings.

This matter was appealed to the Seventh Appellate District Court of Appeals for Columbiana County, Ohio. On December 27, 1985, the intermediate appellate court entered its decision. The free exercise and due process arguments were again pressed by petitioners. The court of appeals, however, refused to discuss these substantive arguments, agreeing with the prosecutor's position that these criminal defendants may not challenge the constitutionality of this law because no effort was made to comply with the law. App. at 30a, 34a.

On June 4, 1986, the Supreme Court of

Ohio granted discretionary review of this case by entering an allowance of a motion to certify the record.

In the Supreme Court of Ohio, petitioners again contended that the statute granting the superintendent the unbridled discretion to grant or approve a request for home schooling violated both the Due Process Clause and the Free Exercise Clause of the United States Constitution.

By a five-to-two vote, the Ohio Supreme Court rejected these constitutional arguments. App. at 1a. Unlike the lower courts, the Supreme Court of Ohio made at least a truncated review of the substantive constitutional arguments. The majority, however, was again controlled by the principle that a person who has not sought approval has not suffered a violation of constitutional rights. They would not assume that the superintendent

would have denied the request. App. at 8a

The majority held that since there was no request for approval of their home school, the petitioners failed to satisfy the second burden prong of the Free Exercise test. App. at 7a, 9a. The court also rejected the Due Process arguments holding that the term "qualified to teach" was "an intelligible principle" which guided a local superintendent's actions. App. at 10a. The court did not attempt to define what "qualified to teach" meant under state law, nor was there any effort made by the prosecutor to contend that this term possessed a definite meaning. Rather, it was conceded by the court that superintendents could vary in their application of this statute, but they contended that any arbitrary or capricious refusals could be

overturned by an administrative appeal to a juvenile court. Id.

Two separate dissents were filed. Both contended that the law was unconstitutionally vague. App. at 13a, 19a. One of the judges also discussed the invasion of the First Amendment values of religious freedom by a vague statute. App. at 15a, 16a. Additionally, the dissent cited Staub v. Baxley, 355 U.S. 313 (1958); Thornhill v. Alabama, 301 U.S. 88 (1940); and Lowell v. Griffin, 303 U.S. 444 (1938), for the proposition that "if a statute is void on its face because it is impermissibly vague, an individual may refuse to comply with the law's requirements and still raise the law's facial invalidity as a defense in a subsequent criminal prosecution under it." App. at 20a.

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate to review the decision below because it is in conflict with the applicable decisions of this Court. While this Court has not addressed a specific home schooling case, the principles which control this case-- void for vagueness, requirement of a neutral decision maker, and free exercise principles -- are clearly established and were not properly followed by the Ohio Supreme Court. Other state supreme courts and lower federal courts have considered certain of the specific issues raised herein in home schooling litigation. The decision below was out of step with these decisions and thereby creates a conflict between state supreme courts as well as with lower federal courts as to issues of federal constitutional law.

The substantive constitutional issues in this case are of sufficient import standing alone to warrant review by this Court. However, the need for certiorari becomes even more evident in light of the lower court's holding, over a vigorous a dissent, that the First and Fourteenth Amendment challenges made herein to a state criminal statute may not be raised in a criminal prosecution.

I. CRIMINAL DEFENDANTS NEED NOT ATTEMPT TO COMPLY WITH A STATE REGULATORY STATUTE IN ORDER TO CHALLENGE THE CONSTITUTIONALITY OF SAID STATUTE IN A CRIMINAL ENFORCEMENT PROCEEDING.

Home schooling is clearly permitted under Ohio Rev. Code § 3321.04 (A) if the local superintendent of schools deems the parent-teacher to be "qualified to teach." In this case, the Supreme Court of Ohio construed this statute to require a parent to obtain the prior approval of the local superintendent of schools. As

so construed, a parent who obtains the permission of the local superintendent of schools may legally teach their child or children at home. Those who do not obtain such permission may be criminally prosecuted under Ohio's compulsory attendance law. Ohio Rev. Code § 3321.38.

Under Ohio law if a parent seeks such approval and the local superintendent refuses, a parent may appeal to the juvenile court of the county for review of the decision. Ohio Rev. Code § 3331.08. According to the state supreme court below, the juvenile court will review the decision of the superintendent to determine if the approval was denied arbitrarily or capriciously. App. at 10a.

The Ohio Court of Appeals held in this case that it would not reach the substantive constitutional challenges to the statute because the Schmidts had

failed to seek the local superintendent's approval. The intermediate court held:

> The brief of the appellants and the brief of the amicus curiae raised many serious constitutional questions which we do not and should not consider lightly. However, there is one fact which flows all through this case which we deem of threshold importance and that is the fact that these two appellants at no time made any attempt to, in any way, comply with the compulsory attendance laws of the State of Ohio.
>
> . . .
>
> If proper application had been filed with the superintendent of schools and a thorough and proper investigation conducted with opportunity furnished to the Schmidts to prove that their daughter, Sara, was entitled to excused absences, an opportunity would have been furnished to the superintendent of schools whereby he could have articulated reasons for granting the application or denying the application. If his decision did not meet with the satisfaction of the appellants, a proper appeal could have been filed with the juvenile court and, at that point, the juvenile judge could have reviewed, in a more proper atmosphere, the decision of the superintendent along with the reasons given in support of such decision by the superintendent.

App. at 30a

The Supreme Court of Ohio employed this same principle in rejecting this substantive constitutional arguments of the Schmidts, although this was done in the form of a truncated review of each of the major constitutional issues raised. The State Supreme Court rejected the First Amendment Free Exercise challenge saying:

> This court will not speculate as to what result the superintendent would have reached had appellants submitted a proposal. We will not presume that the superintendent's actions would have been unconstitutional.
>
> . . .
>
> Without an application by appellants and without a proposal to the superintendent, there is no way to balance appellants' right to the free exercise of their religion in respect to Sara's education against the state's interest, albeit by least restrictive means, in her education. We therefore do not reach the third prong [compelling state interest/least restrictive means] of the test in Whisner.

App. at 9a.

As to the vagueness challenge, the Supreme Court of Ohio rejected the argument saying:

> Finally, the requirement, under R.C. 3321.04(A)(2), that the approval of the local superintendent must be obtained before removing a child from a school to a home education program is not vague. Appellants knew that the law required them to request Superintendent Stiller's approval in order to educate Sara at home.

App. at 11a

The two dissenting judges took vigorous exception to this central holding of the court. Not only did the two dissenters object to the substantive holdings of the majority, but Judge Brogan also wrote:

> If a statute or regulation is void on its face because it is impermissibly vague, an individual may refuse to comply with the law's requirements and still raise the law's facial invalidity as a defense in a subsequent prosecution under it. Staub v. Baxley, (1958) 355 U.S. 313; Thornhill v. Alabama, (1940) 310 U.S.

88; Lowell v. Griffin, (1938) 303 U.S. 444, 452-453.

App. at 20a.

The proper rule of law was enunciated by this Court in the cases cited by the dissenting state judge. In Thornhill, this Court said:

> The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. . . . One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it.

Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

A criminal defendant may challenge the constitutionality of the underlying statute regardless of the reason government approval was not sought in the first place. If a newspaper reporter is required to obtain a license to write stor-

ies, he may refuse to even seek the license and choose to defend when prosecuted criminally.

The Schmidts did not refuse to seek approval in order to manufacture a constitutional test case, as might be the case with our hypothetical reporter. In this case there were two important reasons the Schmidts refused to seek approval. First, based upon information given by the Department of Education, the Schmidt's believed that their arrangement with Winchester Christian Academy gave them legal authority to teach Sara at home. Second, their religious beliefs prohibited them from seeking secular involvement of the superintendent with their religiously pervasive form of education.

In reality the Schmidts were prosecuted and convicted for doing what the

State Department of Education said at the time of their actions, that it was legal for them to do. If the rule of Thornhill did not exist, the interest of justice would require the creation of such a rule under these circumstances. Fortunately, the rule of Thornhill does exist; the only problem is that the lower courts in this case refused to follow it.

Certiorari is necessary to insure that criminal defendants who wish to raise constitutional challenges to licensing/approval laws in Ohio continue to have the right to do so.

II. OHIO'S HOME SCHOOLING LAW IS CLEARLY VOID FOR VAGUENESS

Ohio Rev. Code § 3321.04(A)(2) permits home schooling but only if the local superintendent of schools deems the parents to be "qualified." Petitioners

challenge this provision as being unconstitutionally void for vagueness because there are so many differing views as to what "qualified" means. To the local superintendent "qualified" meant the possession of an Ohio teaching certificate. The State Superintendent, on the other hand, said that "a sensitive inquiry should be made" and that he recommended approval if the parent had a B.A.

Judge Locher's dissent accurately describes the situation this way:

> This statute affords no guidance to local superintendents limiting their discretion in determining who is "qualified to teach." The decision of the superintendent may rest upon ad hoc and subjective standards. What must be the educational background of the teachers -- must they be state certified or does "qualified" allow less than that?
>
> Today's decision forces the Schmidts to subject their sincerely held religious beliefs to the judgment of a local school superintendent who is free to make the determination without guidance. I fail to see any language in the statute which pro-

> vides the "intelligible principle" for decision-making espoused by the majority.
>
> Even the majority recognizes than an arbitrary and capricious refusal can be made by a local superintendent. However, they believe that such an unjust refusal can be simply corrected by an appeal to the juvenile court pursuant to R.C. 3331.08. What guidelines are provided for the juvenile court to review the qualifications of the "home school" teacher?
>
> . . .
>
> This statute fails to provide a local superintendent with any guidelines as to who is "qualified to teach" and in effect, permits a school superintendent to determine who is violating the law. Thus, I find it to be an improper delegation of authority contrary to the basic values underlying the principles of due process. See Grayned v. City of Rockford (1972), 408 U.S. 104.

App. at 14-15a.

The majority below held that the statute was not void for vagueness because it is clear to home schooling parents that the law requires them to obtain the local superintendent's approval. Such an observation misses the

thrust of our vagueness challenge. It has never been disputed that the law was vague as to whether or not approval was required. Rather, petitioners' contention has always been that the law was vague because neither parents, superintendents, nor juvenile judges have any guidance as to what "qualified to teach" means.

This is not unlike the situation in Hague v. CIO, 307 U.S. 496 (1939), where the local director of public safety had the unbridled discretion to prevent assemblies in public parks if, in his unbridled discretion, refusal would prevent riots or disturbances. This Court struck down that legislative scheme because of the unilateral discretion given to that local official.

This Court has made it clear that a statute is void for vagueness if "it

subjects the exercise of the right . . . to an unascertainable standard. . . ." Coates v. Cincinnati, 402 U.S. 611, 614 (1971). In the lower court, the majority acknowledged that it is possible for superintendents to make arbitrary and capricious decisions, but believed that court review could correct any such decisions. App. at 10a. However, this Court has held the doctrine prohibiting vague statutes "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" Smith v. Goguen, 415 U.S. 566, 572-73 (1974). The mere possibility that a court may correct an arbitrary and capricious refusal does not

satisfy due process standards.[2] "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who

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[2]The dissenting judges noted that reviewing courts would also have difficulty finding ascertainable standards to review a decision of a local superintendent. App at 14a. The Court of Appeals engages in a very interesting discussion of the reluctance of courts to judge such matters. App. at 35a. They cite the criminal trial court saying:

> The court certainly has not the time or resources in order to ferret out those children in a home study program and to continually monitor the parents to insure the child is in fact receiving an inadequate [sic] education.

It is highly important to note that the same juvenile judge who didn't have the time or resources to consider the educational issues in the criminal case, would be sitting again as juvenile judge to review a superintendent's denial. It is doubtful that he would take the time or resources to make an independent judgment.

should be set at large." U.S. v. Reese, 92 U.S. 214, 221 (1876).

This Court has "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria..." Kunz v. New York, 340 U.S. 290, 294 (1951). As in Saia v. New York, 334 U.S. 558 (1948), this is a situation where the superintendent may for reasons, which are wholly within his own control, deem one person to be qualified and then next unqualified to teach their children at home. For each superintendent in Ohio "there are no standards prescribed for the exercise of his discretion." 334 U.S., at 559.

The requirement of giving sufficiently clear standards to enforcement officials has been described by this Court as "the more important aspect of the vague-

ness doctrine." Kolender v. Lawson, 461 U.S. 352, 358 (1983). Therefore, the Supreme Court of Ohio, clearly missed the point of this Court's decisions when it held that the statute was not vague because it was clear to the Schmidts that they were required to obtain the superintendent's permission.

The lower court's decision in this case also creates a clear conflict with the decisions of the Supreme Courts of Minnesota, Wisconsin, and Georgia, and with the Eighth Circuit Court of Appeals, as well as a federal district court for the Eastern District of Missouri. Each of these courts have recently considered a challenge to a similar provision to their respective state private education laws. In four of the five cases, the suits involved home schools, and in the fifth it was a private Christian school

case. In each of these prior cases, the courts have held a portion of the state law in question to be unconstitutionally void for vagueness.

In State v. Newstrom, 371 N.W.2d 525 (Minn. 1985), the Supreme Court of Minnesota held Minnesota's requirement that a home school students must be "taught by teachers whose qualifications are essentially equivalent to the minimum standards for public school teachers of the same grades or subjects" to be unconstitutionally void for vagueness. The Minnesota requirement is a great deal more clear than Ohio's broader term "qualified to teach." If the Minnesota language fails to pass constitutional muster, it is even more clear that Ohio's similar provision should fall under the federal Due Process Clause.

In Roemhild v. Georgia, 308 S.E.2d

154 (Ga. 1983), and in Wisconsin v. Popanz, 332 N.W.2d 750 (Wis. 1983) the Supreme Courts of Georgia and Wisconsin respectively held their statutes unconstitutionally void for vagueness in home school cases. In each of these cases the statutes permitted attendance at private schools without any definition of what constituted a private school. In Popanz, the court said, "standards cannot lie only in the minds of persons whose duty it is to enforce the law." 332 N.W.2d at 756. In Roemhild, the court said, "the statute violates a second due process value in that it impermissibly delegates to local law enforcement officials, judges, and juries the policy decision of what constitutes a 'private school'." 308 S.E.2d at 158.

Two federal cases have reached similar results. In Ellis v. O'Hara, 612

F.Supp. 379 (E.D.Mo. 1985), the court held that Missouri's law requiring "substantially equivalent instruction" was unconstitutionally void for vagueness. The court there said that, "This statute represents a prime example of legislation which yields an unacceptable amount of discretion to officials charged with enforcement." 612 F. Supp. at 381. In Fellowship Baptist Church v. Benton, 620 F.Supp. 308 (S.D. Iowa 1985); affirmed, 815 F. 2d 485 (8th Cir. 1987), Iowa's law requiring substantially equivalent instruction was also held to be unconstitutionally void for vagueness.

Certiorari is necessary to correct a glaring inconsistency in Ohio. The void for vagueness principles enunciated by this Court have been appropriately followed in other very similar cases in other states and in the lower federal

courts as well. The citizens of Ohio in general and the Schmidts in particular are entitled to the consistent administration of justice under the federal Constitution which would result by review of this case in this Court.

III. OHIO LAW IMPERMISSIBLY GIVES DECISION MAKING AUTHORITY TO AN OFFICIAL WITH A FINANCIAL STAKE IN THE OUTCOME

Another due process violation present in Ohio law is the fact that the local school superintendent has a vested financial stake in the outcome of his decision as to whether or not to grant a request for home schooling. Simply put, if he denies the request, there is a substantial likelihood that the child would be required to be enrolled in the public school. A great number of families who home school do so because of their financial inability to send their children to

a private religious school. Therefore, a decision denying a home schooling request puts additional money into the coffers of the superintendent's own school district.

This Court has clearly held that granting decision making authority to an official who has a financial stake in the outcome of the decision violates the Due Process Clause. In Tumey v. Ohio, 273 U.S. 510 (1927), a mayor was the decision-maker in a legal process concerning a liquor law. If the mayor decided in favor of the individual, the city would receive no money. But if the mayor decided against the individual appearing before him, the mayor received a nominal sum of money while the city received a substantial sum of money. This Court held that both types of financial incentives violate the Due Process Clause. It does not matter if the situation is as

here, where the financial incentive flows exclusively to the governmental entity and not to the individual. Tumey also stands for the proposition that a local government official who has a financial stake in the outcome on behalf of his local governmental unit, is not a neutral decision-maker for the purpose of the Due Process Clause.

In a more recent case, Ward v. Monroeville, 409 U.S. 57 (1972), this Court reaffirmed Tumey and made even more clear that the financial incentive need not be personal to the decision-maker. A financial incentive on behalf of his governmental unit is sufficient to violate the Due Process Clause.

> . . . [T]he test is whether the mayor's situation is one which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice,

> clear and true between the State and the accused. . . .[Citation omitted]. Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a situation in which an official perforce occupies two practically and seriously inconsistent positions one partisan and the other judicial, [and] necessarily involves a lack of due process of law . . . .

409 U.S., at 60.

It might be argued that the fact that the superintendent has a financial stake in the outcome is of no consequence, since the local board's decision is potentially reviewable by the process of appeal to the courts. This Court rejected that argument as well in Ward saying:

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal.

> Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

409 U.S., at 61-62. [Emphasis added.]

The only federal court to comment, thus far, on the application of this financial incentive/Due Process argument in an education case, came down clearly in favor of the petitioners' position in this case. In Fellowship Baptist Church v. Benton, 620 F.Supp. 308 (S.D. Iowa 1985), the federal district court stated the following, in a case challenging Iowa's private education law:

> The Court cannot leave this issue without pointing out other troubling matters. There may be problems when the responsibility of determining equivalent education is placed on local school boards even when more closely defined for two reasons. First each local school board may still have a different interpretation. Second, local school boards

> **have an inherent conflict of interest since each student in a private school is potentially a source of additional state aid.**

620 F.Supp., at 318. [Emphasis added.]

It is clear that the Due Process Clause is contravened when a government decision-maker can effectively put money into his official coffers by denying a parent the right of home education.

It is interesting to note that both Tumey and Ward were cases where this Court reversed decisions of the Supreme Court of Ohio. Once again it is necessary to grant certiorari to prevent Ohio officials from making due process decisions when they have a financial stake in the outcome.

IV. THERE HAS BEEN A CLEAR BURDEN ON PETITIONERS' FREE EXERCISE OF THEIR RELIGION

The Ohio Supreme Court employed the

correct legal test in analyzing petitioners' free exercise claims. See, Wisconsin v. Yoder, 406 U.S. 205 (1972). The majority concluded that there was no dispute as to the sincerity of the Schmidts' religious beliefs that they must teach their children at home. App. at 7a.

However, the majority held that the Schmidts had not demonstrated that their beliefs had been burdened. This holding was premised upon the failure of the Schmidts to seek the approval of the Superintendent. The lower court held that they would not presume that the Superintendent would act unconstitutionally. The majority stated that since the Superintendent might have granted their request, that without a request and a denial there is no burden on the Schmidts' religious belief.

An analogy from another First Amendment area is helpful in focusing the constitutional issues here. If the law in question required newspaper reporters to get the permission of the mayor before writing an article about city government, no court in America would dare to contend that there was no burden upon the First Amendment freedoms by such a requirement. It would be outrageous to even suggest that a reporter could not claim a First Amendment violation because, "Who knows? Perhaps the mayor would have granted permission to write the article the reporter had in mind."

A burden on the free exercise of religion is present whenever the government prohibits the religious adherent from following the dictates of his or her religious belief. See Thomas v. Review Board, 450 U.S. 707, 717, 718 (1981),

State v. Whisner, 47 Ohio St. 2d 181, 200-207, 351 NE 2d 750, 762-764 (1976). In this case, the prohibition comes in the form of a criminal conviction of the parents for following their sincerely held religious beliefs about the education of their children.

The Supreme Court of North Dakota had no trouble in concluding that a burden on free exercise was present in a home schooling case when the state prohibits parents from following their beliefs which require them to teach their own children. State of North Dakota v. Patzer, 382 N.W.2d 631 (N.D. 1986), cert. denied 107 S. CT 99 (1986).

The burden prong of the free exercise test has clearly been met in this case. However, this does not end the matter since the issues of compelling state interest and least restrictive means

necessarily follow.

Petitioners have conceded at all stages that there is a compelling state interest in the education of children which grants the state certain powers to legislate on this subject. But as important as the state's interest is in education, it does not extend to the point to permit vague and arbitrary regulation. A vague law may be aimed at a compelling state interest, but it cannot satisfy the least restrictive means test since by definition vague laws are not drawn with the requisite narrow specificity. Ellis v. O'Hara, 612 F. Supp. at 381.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

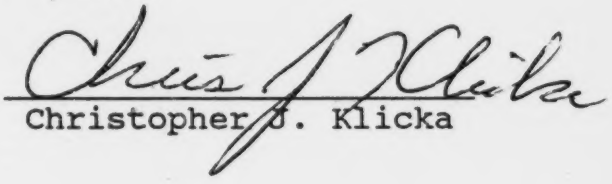
MICHAEL P. FARRIS
Home School Legal Defense
Association
731 Walker Road
Suite E-2
Great Falls, Virginia 22066
(703) 759-7577

CERTIFICATE OF SERVICE

Christopher J. Klicka certifies that on this day he mailed by First Class Mail three copies of the foregoing petition for writ of certiorari to counsel of record for respondent as follows:

Melissa Byers
105 S. Market St.
Lisbon, OH 44432

July 6, 1987



Christopher J. Klicka

APPENDIX

1 -- Supreme Court -- File 5208

THE STATE OF OHIO, APPELLEE,
V.
SCHMIDT ET AL., APPELLANTS.

(Cite as State v. Schmidt (1987), 29 Ohio St. 3d ____)

Schools - Home education programs - Application requirement of R.C. 3321.04 (A) (2) does not infringe upon free exercise of religion.

The requirements of R.C. 3321.04(A)(2) that application be made to the local superintendent of schools for approval of a home education program reasonably furthers the state's interest in the education of its citizens and does not infringe upon the free exercise of religion. Such requirement is neither vague nor an improper delegation of authority.

(No. 86-263 - Decided March 25, 1987)

Appeal from the Court of Appeals for Columbiana County.

On October 12, 1984, Roger M. Stiller, Superintendent of the Columbiana Exempted Village School District, filed two complaints charging defendants-appellants, Richard and Pamela Schmidt, with failing to send their daughter,

Sara, a minor of compulsory school age, to a school or special education program conforming to the minimum standards established by the State Board of Education, in violation of R.C. 3321.04 and 3321.38 (A). Each complaint contained twenty counts, alleging that appellants failed to send Sara to a school on twenty successive school days between September 17 and October 12, 1984.

Richard and Pamela Schmidt are "born-again Christians," and believe that it is their undelegable duty as parents to educate Sara themselves. Appellants undertook to teach Sara at home with assistance from a correspondence curriculum they obtained from Winchester Christian Academy, a private, non-chartered school located in Columbus. Appellants enrolled Sara as a student at

Winchester Christian Academy, but she has never attended classes there.

Upon becoming aware that Sara was of compulsory school age but was not attending a school, Superintendent Stiller informed appellants that they were required by Ohio law to obtain his approval for their home education program. Appellants did not seek Stiller's approval because they felt that their religious beliefs not only required them to educate Sara at home themselves, but also forbade them from seeking Stiller's permission to do so.

The matter came to trial on February 28, 1985, before the Columbiana County Court of Common Pleas, Juvenile Division, and on April 8, 1985, the court entered judgment finding both appellants guilty as charged. The court of appeals affirmed.

The cause is now before this court upon the allowance of a motion to certify the record.

David Tobin, prosecuting attorney, and Melissa Byers, for appellee.

Michael P. Farris and Stephen P. Leiby, for appellants.

HERBERT R. BROWN, J. The central issue raised is whether the requirement under R.D. 3321.04(A)(2),[1] that parents must seek the approval of the local school board superintendent for their home education program in order to obtain an excuse from the compulsory education laws, infringes upon the religious freedom of appellants.[2]

Appellants acknowledge, as they must, that the state has a compelling interest in the education of its citizens.[3]

Nevertheless, appellants argue that R.C. 3321.04(A)(2) violates the First Amendment to the United States Constitution.[4] Appellants claim an impermissible infringement of their religious beliefs because the approval requirement is not the "least restrictive means" that Ohio could have employed to achieve its interests.

In State v. Whisner, (1976) 47 Ohio St. 2d 181, 1 O.O. 3d 105, 351 N.E. 2d 750, this court applied a three-prong test to determine whether the "minimum standards" promulgated by the State Board of Education impermissibly infringed upon the right of parents of children attending a non-public school to the free exercise of religion. (See, also, State, ex. rel. Nagle v. Olin, 64 Ohio 2d 341, 18 O.O. 3d 503, 415 N.E. 2d 279.)

As applied to the facts of the instant case, that test can be summarized as follows:

(1) Are the religious beliefs truly held?[5]

(2) Has it been shown that the approval requirement of R.D. 3321.04(A)(2) infringes upon appellants' constitutional right to the free exercise of religion?

(3) If both (1) and (2) have been satisfied by appellants, has the state demonstrated that its compelling interest in the education of its citizens cannot reasonably be achieved by means that would impose a lesser infringement upon appellants' right to the free exercise of religion?

If appellants fail to satisfy the first two prongs of this test, and if the state fails to satisfy the third prong,

then appellants must prevail. Whisner, supra.

We find no indication in the record that appellants' claimed religious beliefs are not sincere. Thus appellants meet this threshold test.

However, appellants fail to demonstrate that the approval requirement of R.D. 3321.04(A)(2) infringes upon their right to the free exercise of religion.

Unlike the compulsory attendance statutes of most states,[6] R.D. 3321.04 specifically provides a home education exception. It acknowledges the right of parents to educate their children at home, and guards against the abuse of that right by requiring parents to obtain the approval of the local superintendent for their home education programs. Despite the invitation from Superintendent Stiller to discuss their plan for educa-

ting Sara at home, appellants failed to submit a proposal requesting his approval.

This court will not speculate as to what result the superintendent would have reached had appellants submitted a proposal. We will not presume that the superintendent's actions would have been unconstitutional. See Bow v. Cleveland, (1919), 99 Ohio St. 269, 273, 174 N.E. 132, 133, 12 A.L.R. 1424, 1427.[7]

The case sub judice does not fall within the reach of Wisconsin v. Yoder, (1972), 406 U.S. 205, wherein the United States Supreme Court enunciated a standard consistent with our holdings in Whisner and Olin, supra. Here, as distinguished from Yoder,[8] appellants have made a unilateral decision to ignore the plain requirement that an application for

their home education proposal be submitted.

Without an application by appellants and without a proposal to the superintendent, there is no way to balance appellants' right to the free exercise of their religion in respect to Sara's education against the state's interest, albeit by least restrictive means, in her education.[9] We therefore do not reach the third prong of the test in Whisner.

We hold that the requirement under R.C. 3321.04(A)(2), that parents must seek the approval of the local superintendent for their home education program in order to obtain an excuse from the compulsory attendance laws, reasonably furthers the state's interest in the education of its citizens and does not infringe upon the free exercise of religion.[10]

Nor are we persuaded by appellant's contention that there is an improper delegation of authority in the requirement that local superintendents throughout Ohio make the initial determination as to who is qualified to give home instruction. The statute gives the superintendent an intelligible principle for his guidance and the desirable flexibility to accommodate home education programs that parents such as appellants and those similarly situated may wish to pursue. An arbitrary and capricious refusal by the superintendent can be measured and corrected in the appeal procedure provided by R.C. 3331.08. See Blue Cross v. Ratchford (1980), 64 Ohio St. 2d 256, 18 O.O. 3d 450, 452, 416 N.E. 2d 614, 617-618.[11]

Finally, the requirement, under R.C. 3321.04(A)(2), that the approval of the

local superintendent must be obtained before removing a child from a school to a home education program is not vague. Appellants knew that the law required them to request Superintendent Stiller's approval in order to educate Sara at home.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, HOLMES and DOUGLAS, JJ., concur.

LOCHER and BROGAN, J.J., separately dissent.

BROGAN, J., of the Second Appellate District, sitting for WRIGHT, J.

LOCHER, J., dissenting. I believe that the determination to be made by the local school superintendent as to who is "qual-

ified to teach" pursuant to R.C. 3321.04 (A)(2) is an improper delegation of authority contrary to the basic values underlying the principles of due process. Therefore, I respectfully dissent.

R.C. 3321.04(A)(2) provides in pertinent part:

"(A) The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:

"* * *

"(2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required* * *. In each such case the issuing superintendent shall file in his office, with a copy of the excuse, papers

showing how* * * the qualifications of the person instructing the child at home were determined.* * *" (Emphasis added)

This statute affords no guidance to local superintendents limiting their discretion in determining who is "qualified to teach." The decision of the superintendent may rest on ad hoc and subjective standards. What must be the educational background of the teachers--must they be state-certified or does "qualified" allow less than that?

Today's decision forces the Schmidts to subject their sincerely held religious beliefs to the judgment of a local school superintendent who is free to make the determination without guidance. I fail to see any language in the statute which provides the "intelligible principle" for decision-making espoused by the majority.

Even the majority recognizes that an arbitrary and capricious refusal can be made by a local superintendent. However, they believe that such an unjust refusal can be simply corrected by an appeal to the juvenile court pursuant to R.C. 3331.08. What guidelines are provided for the juvenile court to review the qualifications of a "home school" teacher? This court has recognized that "'the courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality'* * * as well as the 'obvious fact that courts are not school boards or legislatures * * *.'" State, ex. rel. Nagle v. Olin, (1980) 64 Ohio 2d 341, 353, 18 O.O. 3d 503, 510-511, 415 N.E. 2d 279, 288.

This statute fails to provide a local superintendent with any guidelines as to

who is "qualified to teach" and, in effect, permits a school superintendent to determine who is violating the law. Thus, I find it to be an improper delegation of authority contrary to the basic values underlying the principles of due process. See Grayned v. City of Rockford (1972), 408 U.S. 104.[12] Accordingly, I respectfully dissent.

BROGAN, J., dissenting. I must respectfully dissent from the majority opinion. In State, ex. rel. Nagle v. Olin, (1980) 64 Ohio 2d 341, 18 O.O. 3d 503, 415 N.E. 2d 279, this court noted:

"In balancing an individual's right to freely exercise religious beliefs against a state's legitimate interest in assuring that its citizens receive quality educations, a court performs a sensitive and delicate task. Wisconsin v.

Yoder, supra, at page 235. Our decision today, as in State v. Whisner, demonstrates simply that until such time as the State Board of Education adopts minimum standards which go no further than necessary to assure the state's legitimate interests in the education of children in private elementary schools, the balance is weighted, ab initio, in favor of a First Amendment claim to religious freedom." Id. at 354-355, 18 O.O. 3d at 511, 415 N.E. 2d at 288.

R.C. 3321.04 provides in part that excuses from future attendance at or past absence from school or a special education program may be granted for cause by the local superintendent of schools under the following condition:

"* * *(A)(2) That * * * [the child] is being instructed at home by a person qualified to teach the branches in which

instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require. * * *" (Emphasis added.)

This statute gives the local school superintendent the unbridled discretion to determine if a home-schooling teacher is "qualified." In fact, the local superintendent admitted upon cross-examination that the statute provides wide latitude to school superintendents and different superintendents interpret and apply the code section differently. He testified the statute could be interpreted six hundred fifteen different ways by each of the six hundred fifteen superintendents of schools in the state. He further testified that the code section is not clear, is ambiguous, and needs clarification by the court so that

parents and superintendents of schools will know what conduct is permitted and what conduct is prohibited.

In Roemhild v. State, (1983) Ga. 569, 308 S.E.2d 154, the Georgia Supreme Court held that the Georgia compulsory school attendance statute was not sufficiently definite to provide a person of ordinary intelligence, who desired to avoid its penalties by having his or her children attend private school, fair notice of what constituted a "private school" and, thus, was void for vagueness. The court also noted that the law failed to establish minimum guidelines as to what constituted a "private school," so as to impermissably delegate to local enforcement officials, judges and juries the policy decision of what constituted a "private school" in determining whether individuals had complied with law and

was, therefore, unconstitutionally vague. See, also, State v. Popanz, (1983) 112 Wis. 2d 166, 332 N.W.2d 750.

As generally stated, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson (1983) 461 U.S. 352, 357.

R.C. 3321.04(A)(2) is unconstitutionally void for its vagueness in that the definition of a "person qualified to teach" does not afford a person of average intelligence what is required under the statute, and it violates the Due Process Clauses of the Ohio and United States Constitutions since it delegates unbridled discretion to a

government official as to whether parents can exercise the fundamental constitutional right of teaching their child at home.

If a statute or regulation is void on its face because it is impermissibly vague, an individual may refuse to comply with the law's requirements and still raise the law's facial invalidity as a defense in a subsequent prosecution under it. Staub v. Baxley (1958), 355 U.S. 313; Thornhill v. Alabama (1940), 301 U.S. 88, Lowell v. Griffin (1938), 303 U.S. 444, 452-453.

I would reverse the judgment of the court of appeals and enter judgment for the appellants.

1. R.C. 3321.04 provides, in pertinent part:

"Every parent of any child of compulsory school age who is not employed under an age and schooling certificate must send such child to a school or a special education program that conforms to the minimum standards prescribed by the state board of education, for the full time the school or program attended is in session, which shall not be for less than thirty-two weeks per school year.* * *

"* * *

"Excuses from future attendance at or past absence from school or a special education program may be granted for the causes, by the authorities, and under the following conditions:

"(A) The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:

"* * *

"(2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require. In each such case the issuing superintendent shall file in his office, with a copy of the excuse, papers showing how the inability of the child to attend school or a special education program or the qualifications of the person instructing the child at home were determined. All such excuses shall be-

come void and subject to recall upon the removal of the disability of the child or the cessation of proper home instruction; and thereupon the child or his parents may be proceeded against after due notice whether such excuse be recalled or not."

2.Appellants' claims based on R.C. 3321.04(C) are misplaced, as that section is inapplicable to permanent or long-term absences from a school. See 1974 Ohio Atty. Gen. Ops. No. 74-066; and 1979 Ohio Atty. Gen. Ops. No. 79-056.

3.See Wisconsin v. Yoder (1972), 406 U.S. 205, 213-214, wherein the court declared:

"There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.* * * [Nevertheless,] a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment. * * *."

4.The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof* * *."

5.As the court explained in United States v. Seeger (1965), 380 U.S. 163, 185:

"* * * [W]e hasten to emphasize that

while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact* * *."

6.As of 1982, only fifteen states had statutes explicitly providing for home education. See Tobak & Zirkel, Home Instruction: An Analysis of the Statutes and Case Law (1982), 8 U. Dayton. L. Rev. 1, 5-12.

7.Moreover, the rights of parents are protected by R.C. 3331.08, which provides for judicial review of a superintendent's decision not to grant a requested excuse from the compulsory attendance laws:

"In case a superintendent of schools refuses to excuse a child from attendance at school for one of the reasons stated in section 3321.04 of the Revised Code, or refuses upon request to grant an age and schooling certificate as provided in section 3331.01 of the Revised Code, an appeal may be taken from such decision to the juvenile judge of the county, upon the giving of bond, within ten days thereafter, to the approval of such judge, to pay the costs of appeal. His decision in the matter shall be final."

8.In Yoder, an approval was requested but denied. Id. at 207-208, fn. 2, and at 208-209, fn. 3.

9.The Supreme Judicial Court of Maine has held:

"* * * For the state to allow home education without imposing some standards as to quality and duration would be, in many cases, to allow parents to deprive their children of any education whatsoever. Not all parents who would hold their children out of school under such an unlimited exception to the compulsory education statute would have the sincere desire, which is no doubt present in the instant case, to provide their children with adequate instruction. Furthermore, many parents, even though they have a sincere desire to educate their children at home, lack the necessary training and facilities to do so." State v. McDonough (Me. 1983), 468 A. 2d 977, at 980.

10.See State v. McDonough, supra, State v. Riddle (1981), 168 W. Va. 429, 285 S.E. 2d 359.

11.See, also, State v. Riddle, supra.

12.See, also, State v. Newstrom (Minn. 1985), 371 N.W.2d 525, State v. Popanz (1983), 112 Wis. 2d 166, 332 N.W.2d 750, Roemhild v. State (1983), 251 Ga. 569, 308 S.E.2d 154

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	CASE NO.
	)	85-C-28
	)	
- VS -	)	OPINION
	)	
RICHARD and PAMELA SCHMIDT,	)	
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Columbiana County Common Pleas Case No. A11833 and A11834

JUDGMENT:
Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Melissa Byers
Asst. Prosecuting Attorney
105 S. Market Street
Lisbon, Ohio 44432

For Defendants-Appellants:

Jordan W. Lorence
122 C St. NW
Suite 800
Washington, D.C.
20001

and

Stephen P. Leiby
111 Stow Avenue,
Suite 100
Cuyahoga Falls,
Ohio 44221

Hon. Joseph Donofrio,
Hon. Edward A. Cox,
Hon. Joseph E. O'Neill, JJ.

DATED:

December 27, 1983

O'NEILL, J.

At all times pertinent to this matter, the appellants, Richard Schmidt and Pamela Schmidt, husband and wife, were the parents of Sara Schmidt, a minor, born January 11, 1978. On October 12, 1984, by way of complaint, Mr. and Mrs.

Schmidt were charged with failing to send their daughter to a school or a special education program that conformed to the minimum standards prescribed by the Ohio State Board of Education. The complaint went on to allege that Sara was not employed under an age or school certificate and that attendance at school had not been excused under subsections A, B or C of the R.C. 3321.04, in violation of R.C. 3321.04, being in turn a violation of R.C. 3321.38(A), these failures subjecting the offenders to the penalties as set forth in R.C. 3321.99(A) a minor misdemeanor.

Each of the complaints contained 20 counts alleging that the defendants failed to send their daughter, Sara, to a school on 20 successive school days. The matter came on for trial on February 28, 1985. On April 18, 1985, the court ent-

ered his judgment finding both defendants guilty as charged and ordered each defendant to deposit with the court cash bond in the sum of $100.00 conditioned as provided by R.C. 3321.38, that he or she will cause their child under their charge to attend upon instruction as provided by law and remain as a pupil in the school or class during the term prescribed by law.

Notice should be taken of the fact that this code section provides for no sentence nor any fine. The penalty section for Chapter 3321 is found in R.C. 3321.99, which reads as follows:

> "(A) Whoever violates division (A) of section 3321.38 of the Revised Code shall be fined not less than five nor more than twenty dollars.
>
> (B) Whoever violates division (B) of section 3321.38 of the Revised Code shall be imprisoned not less than ten nor more than thirty days."

This proceeding, in its entirety, was a criminal proceeding and it is a general rule of law that a defendant, in a criminal proceeding, has no right of appeal except from the final judgment and sentence rendered at the conclusion of the trial. In the case of State of Ohio v. Williams (1973), 40 Ohio App. 2d 310, this court of appeals ruled, in Paragraph 1 of the syllabus, as follows:

> "In a criminal case, the sentence is the judgment from which an appeal may be taken."

Paragraph (A) of R.C. 3321.99 gives the trial court no discretion. The statute very specifically states that whoever violates Division (A) of R.C. 3321.38 of the Revised Code, shall be fined not less than five nor more than twenty dollars. The trial judge, in his entry of April 8, 1985, found that the

defendants were each guilty as charged. The two defendants were charged with being in violation of R.C. 3321.38(A). We have serious reservations as to whether this case is properly before this court as an appealable matter.

The brief of the appellants and the brief of the amicus curiae raised many serious constitutional questions which we do not and should not consider lightly. However, there is one fact which flows all through this case which we deem of threshold importance and that is the fact that these two appellants at no time made any attempt to, in any way, comply with the compulsory attendance laws of the State of Ohio. Amongst the findings of facts, filed by the trial judge, it was stated that the defendants admitted that they made no contact with school authorities regarding their child's non-

attendance at school. They admitted that they had deceptively decided months before their child was due to be enrolled in first grade to not apply for an exemption from attendance. R.C. 3321.04 makes provision for excuses from attendance at school. The superintendent may excuse a student upon a satisfactory showing that the student is being instructed at home by a person qualified to teach the branches in which instruction is required and such additional branches as the advancement and needs of the child may, in the opinion of such superintendent, require. If in the instant case the two appellants had requested the approval of the superintendent for home instruction and if their request had been denied by the superintendent, R.C. 3331.08 provides that such refusal could have been appealed to the Juvenile Court. Thus,

the framework of statutes, dealing with compulsory attendance at school, provides a reasonable procedure and affords and protects due process. This choice by the defendants, not to test the adequacy of the home instruction program, in no way was a justification for a blatant refusal to comply with the compulsory attendance law. At the trial of this criminal action, the defendants attempted to justify ignoring the law by proving that the correspondence course provided for the instruction of their child was effective and sufficient. It is our conclusion that this tactic was immaterial to the prosecution. In support of this conclusion, we indulge the same reasoning as that set forth by the Court of Appeals for Summit County in Syllabus 3 of City of Akron v. Lane (1979), 65 Ohio App. 2d 90, which reads as follows:

"A parent cannot defend a prosecution based upon the compulsory education laws by showing that his child is being taught at home in a manner equivalent to, or substantially in compliance with, state minimum educational standards where such parent sought, but failed to obtain, the approval of the district superintendent of schools for home instruction, pursuant to R.C. 3321.04(A)(2), and took no appeal to the Juvenile Court, pursuant to R.C. 3331.08."

There is no doubt as to the power of a state, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education (Wisconsin v. Yoder, 406 U.S. 205), requiring mandatory attendance unless an excuse has been applied for and approved is certainly a reasonable regulation. These appellants would have the trial court and this court make various declarations as to the constitutionality of the compulsory attendance law. Very simply, they have not proven in the trial court that

this law infringes upon any of their religious liberties nor personal liberties. They have totally ignored the application of the law. They have totally ignored a procedure whereby perhaps, within the framework of the law, they would be legally permitted to do that which they wish to do. A person assailing the constitutionality of a statute must be able to show that he has sustained or is in immediate danger of sustaining some direct injury as a result of the enforcement of the legislation. State, ex rel. Lynch v. Rhodes (1964), 176 Ohio St. 251, 254. The trial court in this case did not find the defendants guilty upon the grounds that their home study program, which they administered to their child, was inadequate. In his approved findings of facts and conclusions of law, the court stated very spe-

cifically "the court certainly has not the time or resources to investigate in order to ferret out those children in a homestudy program and to continually monitor the parents to insure the child is in fact receiving inadequate [sic] education." There can be no argument with this conclusion. The legislature has seen fit to impose this duty upon the boards of education and not upon the court. The legislature has seen fit to provide a procedure which insures the education of children either in an attendance program or in a program whereby the children are excused from attendance. The fact that the defendants have seen fit to totally ignore this procedure and opt for criminal activity and criminal prosecution is no justification for a shotgun attack upon the constitutionality of the statutes involved. How are they

to convince us and the lower court that if they had applied for home study that the superintendent of schools, by some unconstitutional act, might have denied their application. If proper application had been filed with the superintendent of schools and a thorough and proper investigation conducted with opportunity furnished to the Schmidts to prove that their daughter, Sara, was entitled to excused absences, an opportunity would have been furnished to the superintendent of schools whereby he could have articulated reasons for granting the application or denying the application. If his decision did not meet with the satisfaction of the appellants, a proper appeal could have been filed with the juvenile court and, at that point, the juvenile judge could have reviewed, in a more proper atmosphere, the decision of the

superintendent along with the reasons given in support of such decision by the superintendent.

Judgment affirmed.

Donofrio, P.J., concurs.

Cox, J., concurs.

APPROVED:

/s/
Judge

STATE OF OHIO,) COURT OF COMMON PLEAS,

COLUMBIANA COUNTY, SS:) JUVENILE DIVISION

STATE OF OHIO JUDGMENT ENTRY AND DECISION

VS.

RICHARD SCHMIDT CASE NO. A11833

STATE OF OHIO

VS.

MRS. RICHARD SCHMIDT CASE NO. A11834

DATED: APRIL 8, 1985

The Court adopts as its Findings Of Fact and Conclusions Of Law, the proposed Findings Of Facts and Conclusions Of Law, submitted on behalf of the State of Ohio by the Assistant Prosecuting Attorney.

The Defendants are each found "guilty" as charged and each are ordered to deposit with the Court, Cash Bond in the sum of One Hundred Dollars ($100.00), conditioned as provided by the Ohio

Revised Code Section 3321.38, that he or she will cause their child under their charge to attend upon instruction as provided by law, and remain as a pupil in the school or class during the term prescribed by law.

Bond to be deposited with the Court on or before Wednesday, April 17, 1985.

Costs in each case taxed against the Defendant.($47.35, each)

/s/
CHARLES A. PIKE, JUDGE

IN THE COURT OF COMMON PLEAS

JUVENILE COURT DIVISION

STATE OF OHIO	)	CASE NOS. A 11834-13-143 A 11834-13-144
Plaintiff	)	
-vs-	)	
MR. SCHMIDT and MRS. SCHMIDT	)	
Defendants	)	

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

PROPOSED FINDINGS OF FACT

A number of factual matters were stipulated to by the Prosecutor and Attorney for the Defendants; to-wit:

1) Sara Schmidt is the child of defendants Richard and Pamela Schmidt;

2) Sara Schmidt is of mandatory school age;

3) Sara Schmidt is not attending a public school;

4) Sara resides within the school district of Columbiana Exempted Village School system;

5) Sara is enrolled in Winchester Christian Academy which is located near Columbus, Ohio;

6) Winchester Christian Academy is a non-chartered, non-tax sup-

ported school;

7) Sara is not physically attending Winchester Christian Academy at its school in Columbus, Ohio;

8) Mr. James Moody is the Chief Administrative Officer of Winchester Christian Academy.

9) Mr. Moody is not a public school official; and

10) Mr. Moody, as a private school Administrator, approved Sara for his instructional program.

Mr. and Mrs. Schmidt admitted under oath that Sara has never attended first grade at either a public or private school. At no time did the defendants notify Superintendent Stiller or the Columbiana Exempted Village School System of their intent not to send Sara to school. In fact, the defendants stated they had been "advised" not to contact

the school authorities regarding Sars's [sic] non-attendance. The defendants admitted they had deceptively decided months before Sara was due to be enrolled in first grade to not apply for an exemption from attendance.

The Defendants admitted that they never applied for an exemption from attending school from Superintendent Stiller. The first contact between the defendants and Columbiana School officials was first initiated by these school authorities.

Although Superintendent Stiller wrote the defendants numerous letters regarding Sara's nonattendance and the availability by law of a "home study exemption", the defendants refused to apply for an exemption. A fortiori, the defendants never "appealed" a decision from Superintendent Stiller since he never had an application

to rule on. Therefore, the defendants have not pursued their administrative remedies by formally applying for a home study exemption and, upon an [sic] rejection of said application an appeal to the Juvenile Court.

Mr. and Mrs. Schmidt testified that they do not have a college degree. Mrs. Schmidt testified that she had a high school diploma from a public school and that she was instructing Sara at home with the help of a mail order correspondence course from Winchester Academy. Although Mrs. Schmidt has no special training or expertise in education, she not only teaches Sara but she administers academic testing, decides when and how much testing is needed, evaluates Sara's academic performance, and determines if Sara is having any academic problems. Mrs. Schmidt testified she incorporates a

correspondence program designed, marketed, and sold by Mr. Moody, who has a PHD [sic] in Philosophy. Mr. Moody and his employee Mr. Johnson, who has a Bachelor of Arts degree, reviews the correspondence programs of over 500 children and in addition, Mr. Moody supervises at least seventy (70) private schools.

The Prosecutor made a Motion in Limne [sic] to exclude any testimony or other evidence as to the content of the home instruction and whether or not such instruction is comparable to that being provided by the public schools. Said Motion was granted on the basis such testimony is irrelevant to this prosecution.

CONCLUSIONS OF LAW

THE DEFENDANTS ARE GUILTY OF VIOLATING OHIO'S COMPULSORY ATTENDANCE LAWS BECAUSE THEY HAVE FAILED TO SEND THEIR CHILD TO A PUBLIC OR PRIVATE SCHOOL, CONFORMING TO MINIMUM STANDARDS AND HAVE NOT APPLIED FOR APPROVAL OF A "HOME STUDY" INSTRUCTION PLAN AS PROVIDED FOR UNDER ORC SECTION 3321.04. NOR HAVE THE DEFENDANTS ATTEMPTED TO APPEAL ANY DENIAL BY THE SUPERINTENDENT OF SCHOOLS FOR AN EXCUSE FROM ATTENDANCE TO THE JUVENILE COURT, PURSUANT TO ORC SECTION 3331.08.

THE "HOME INSTRUCTION" EXCEPTION TO OHIO'S COMPULSORY ATTENDANCE LAWS MAY BE GRANTED FOR A SCHOOL-AGE CHILD ONLY BY THE SUPERINTENDENT OF SCHOOLS AND ONLY UPON A SHOWING THAT [THE CHILD] IS BEING INSTRUCTED AT HOME BY A PERSON QUALIFIED TO TEACH THE BRANCHES IN WHICH INSTRUCTION IS REQUIRED, AND SUCH ADDITIONAL BRANCHES AS THE ADVANCEMENT AND NEEDS OF THE CHILD MAY, IN THE OPINION OF SUCH SUPERINTENDENT REQUIRE. (OHIO REVISED CODE SECTION 3321.04 [A])

OHIO LAW REQUIRES THAT ALL CHILDREN BETWEEN THE AGES OF SIX AND EIGHTEEN YEARS OF AGE MUST ATTEND SCHOOL. OHIO REVISED CODE SECTION 3321.03

MANDATES THAT:

> Except as provided in this section, the parent of a child of compulsory school age shall cause such child to attend a school in the school district in which the child is entitled to attend school under division (B) of section 3313.64 or section 3313.65 of the Revised Code, to participate in a special education program under Chapter 3323. of the Revised Code, or to otherwise cause him to be instructed in acordance [sic] with law.

The duty to attend school may be excused in very limited cases. Exceptions from the compulsory attendance requirements of ORC Section 3321.03 are outlined in Ohio Revised Code Section 3321.04. The exceptions from compulsory education as outlined in ORC Section 3321.04 are exclusive.

The issues in this case are governed by Section 3321.04 of the Ohio Revised Code, which reads in pertinent part:

> Excuses from future attendance at or past absence from school or a special education program may be granted for the causes, by the authorities, and under the

following conditions:

(a) The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:

(1) That his bodily or mental condition does not permit his atendance [sic] at school or a special education program during such period; this fact is certified in writing by a licensed physician or, in the case of a mental condition, by a licensed physician, a licensed psychologist, licensed school psychologist or a certificated school psychologist; and provision is made for appropriate instruction of the child, in accordance with Chapter 3321 of the Revised Code;

(2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require. In each such case the issuing superintendent shall file in his office, with a copy of the excuse, papers showing how the inability of the child to attend

school or a special education program or the qualifications of the person instructing the child at home were determined. All such excuses shall become void and subject to recall upon the removal of the disability of the child or the cessation of proper home instruction; and thereupon the child or his parents may be proceeded against after due notice whether such excuse be recalled or not.

(B) The state board of education may adopt rules authorizing the superintendent of schools of the district in which the child resides to excuse a child over fourteen years of age from attendance for a future limited period for the purpose of performing necessary work directly and exclusively for his parents or legal guardians.

All excuses provided for in divisions (A) and (B) of this section shall be in writing and shall show the reason for excusing the child. A copy thereof shall be sent to the person in charge of the child.

(C) The board of education of the city, exempted village, or county school district in which a public school is located or the governing authorities of a private or parochial school may in the rules governing the discipline in such schools, prescribe the authority by which and the manner in which any child may be excused for

absence from such school for good and sufficient reasons.

The state board of education may by rule prescribe conditions governing the issuance of excuses, which shall be binding upon the authorities empowered to issue them.

(Emphasis added)

Section 3321.04 specifically enumerates the alternatives to attendance referred to in Section 3321.03 by its language "or otherwise cause him to be instructed in accordance with law".

Section 3321.04 clearly establishes there are only three permissable excuses from attending school. These excuses are:

(1) The minor has a physical or mental condition which does not permit attendance;

(2) the minor is being educated at home by a qualified person under a program approved by the superinten-

dent of the school district in which the child resides; and

(3) the minor is over 14 years of age and has a valid work permit.

Section 3321.04 (C) provides for a short term excuse from attending school wherein the public or private school superintendent may excuse, i.e. expel, suspend, or regulated [sic] excuses of, a pupil for disciplinary purposes. Thus, Subsection (C) only permits a private school superintendent to excuse "past" absences pursuant to rules governing the discipline of children. Nor does Subsection C specifically refer to home study instruction as do Subsections A and B. Therefore, under the rules of statutory construction, a specific statute controls a more general statute. If the legislation had intended to allow private schools the authority to approve home

study programs, it could easily have so stated as it did in subsections (A) and (B).

As the testimony established, Sara Schmidt is not attending a public or private school nor have her parents requested and received an approved exemption from Ohio's Compulsory Education laws pursuant to ORC 3321.04. Therefore, the issue of this litigation focuses on Section 3321.04 (A)(2), the "home instruction" exception.

Ohio, unlike a majority of states permits "home instruction" under certain circumstances including for religious reasons. A parent is <u>not</u> mandated by Ohio's Compulsory Education Laws to choose between only two options - sending a child to a public school or to a private school which complies with Ohio's minimum standards. However, the parent

must request and receive approval from the school district before withdrawing their child for home study.

Ohio Revised Code Section 3321.03 clearly mandates that:

> Every child of compulsory school age shall attend a school or participate in a special education program ... until the child either: ...
>
> > (C) is excused from school ... pursuant to Section 3321.04 of the Revised Code.

An Ohio Court dealing directly with this issue interpreted Section 3321.03. In City of Akron v Lane, 65 Ohio App. 2d 90 (1979), a parent attempted to receive approval of the superintendent of schools for a home instruction program, but the approval was not obtained. The parent never appealed the superintendent's decision to Juvenile Court. Rather, the parent withdrew his child from school. The Court held that the parent violated

the compulsory education laws, because he did not receive approval from the superintendent nor take an appeal to Juvenile Court as required by ORC Section 3331.04 before withdrawing his child from school.

In the case at bar, the defendants have blatantly ignored the laws of Ohio and have declared themselves above the law. Defendants contend their religion prevents them from having to be regulated by the state, no matter how slight, regarding the education of their daughter. Defendants contentions have been repeatedly struck down in the past by decisions of the United States Supreme Court and Ohio Supreme Court. The Court in State v Whisner, 47 Ohio St. 2d 181 (1976), recognized that the state has a legitimate interest in ensuring its citizens are education. Whisner stated:

"Numerous decisions of the

Supreme Court of the United States over the years have clearly sounded the death knell with respect to any assertion. . .that the state is devoid of all power to promulgate and enforce reasonable regulations affecting the operation of non-public schools." Id at 197.

Whisner also stated:

"The State's interest in educational quality is an important one, to be characterized as "compelling" so as to overbalance legitimate claims to the free exercise of religion, the state must demonstrate that a regulatory implementation of that interest is such that the state's interest cannot otherwise be served."

A more recent Ohio Supreme Court case corroborated the court's traditional stance regarding the educational interests of the State. In State Ex rel Nagle v Olin, 64 Ohio St.2d 341,354 (1980) the Court held:

We note...that in State v Whisner we emphasized the prima facie reasonableness of the Ohio Complusory [sic] Education enabling legislation particularly R.C. 3301.07 which mandates that non-public schools provide a general education of a high quality. Thus, it would appear that

> standards may properly be devised which are designed to assure achievement by students in a wide range of subject areas.
>
> (Emphasis added)

The Olin Court also explained why the state has a legitimate interest to assure citizens receive a quality education. The Court held:

> Both this Court and the United States Supreme Court have recognized the importance to the state of assuring that children receive quality educations, enabling them to intelligently undertake the obligations of citizenship. Id at 510.

Not one Supreme Court case of the United States has ever overruled the Ohio Supreme Court cases of Whisner, supra and Olin, supra. In fact, the United Supreme Court [sic] has consistently held that the state has the power to promulgate and enforce reasonable regulations affecting the education of its citizens even if

religious beliefs are involved.[1]

Clearly, the Ohio Compulsory Education Statute accommodates first amendment free exercise rights in that ORC Section

---

[1]In Board of Education v Allen, 392 U.S. 236, 245 (1968) the Court stated:

> "A substantial body of case law has confirmed the power of the states to insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction ... [and that] if the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."

More recently, Wisconsin v Yoder, 406 U. S. 205, 213, 236 held:

> "There is no doubt as to the power of a state, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Nothing we hold is intended to undermine the general applicability of the state's compulsory school-attendance statutes.

3321.04 does not preclude a home study exception based on religious beliefs but merely sets forth the circumstances under which a child may be excused from attendance at public or private schools that meet state minimum requirements. In short, Section 3321.04 balances the public's need to assure good education with the uncontrolled withdrawal of students for home instruction which could be claimed by anyone, anytime, for any reason, with poorer [sic] or no education of children as a result.

Defendants cannot successfully claim that the home instruction requirements and procedures outlined in Ohio Revised Code 3321.04 (A)(2) infringe upon their constitutional rights of freedom of religion. First, the Ohio Supreme Court in Whisner, supra and Olin, supra, made it clear that the state may regulate educa-

tion and that once the then existing minimum State Board Standards were redesigned, any conflict between religious freedom and the state's interest in compulsory education would be eliminated.

> We held in State v. Whisner that the minimum standards then in effect "overstep the boundary of reasonable regulation as applied to a non-public religious school." Id., at 204. Despite our holding, the State Board of Education has not adopted new standards for application to non-public schools which, while adequate to assure the provision of "a general education of a high quality," R.C. 3301.07(D), do not simultaneously suffocate "independent thought and educational policy," State v Whisner, supra, at page 215, or abrogate parents" liberty to direct the education of their children, Id., at page 218.
>
> We believe that such a set of less-restrictive standards could be adopted. ... We note ... than in State v Whisner we emphasized the prima facie reasonableness of the Ohio compulsory education enabling legislation, particularly R.C. 3301.07 which mandates that non-public schools provide a general education of a high quality. Thus, it would appear that standards may properly be divised [sic] which are designed to assure achievement by

> students in a wide range of subject areas.
>
> . . .
>
> Our decision today, as in State v Whisner, demonstrates simply that until such time as the State Board of Education adopts minimum standards which go no further than necessary to assure the state's legitimate interests in the education of children in private elementary schools, the balance is weighted, ab initio, in favor of a First Amendment claim to religious freedom.

Olin, supra, 64 Ohio St. 2d at 353-355 (emphasis added).

Significantly, the State Board Standards found to have infringed parental rights in Whisner and Olin have since been replaced with less restrictive regulations envisioned by the Ohio Supreme Court. Thus, the problems with State Board Standards described in the Whisner and Olin cases have been remedied, and State Board Standards can no longer be cited as the basis for any infringement

on constitutionally protected rights in this area.

According to Whisner and Olin, supra, once the minimum standards have been changed, the State's interest in compulsory education is "compelling" and the balance between individual religious rights and state rights is weighted ab initio, in favor of the state. In fact, the Ohio Supreme Court confirmed the state's interest to insist that children attend school, to attend for a minimum of hours of instruction, to be taught by teachers of specified training and to be taught certain subjects. Whisner, supra, at 197.

If the Court follows the defendants' premises, the state would lose all control over education and the compulsory education law would be a joke. The State would not be able to ascertain whether or

not a child was receiving any education, not alone whether the education was adequate. The court is well aware that not every parent, regardless of sincerity, is capable of teaching their children academic courses. The State of Ohio has given deference to religious beliefs of parents by providing a third alternative from sending a child to a public or private school - a "home study" program. The State of Ohio has provided a least restrictive alternative which affords parents religious freedoms without abrogating all state control. Ohio Revised Code Section 3321.04 (A) (2) provides for case by case consideration on individual applications for home study based upon religious reasons. No other control of home instruction can afford more deference to an individual's religious beliefs than a decision made on an individual

basis of consideration by a superintendent that by law has a duty to enforce Ohio's Compulsory Education Laws - the superintendent of the school district where the child resides. Religious freedom is a key consideration in determining whether to grant a home study exemption. See State v OJA, Case #82-11-684-SLV (January 7, 1983) (C.P. Deleware [sic] Cty. - Juv. Ct.).

Secondly, defendants cannot demonstrate infringement upon constitutional rights as a result of ORC Section 3321.04 (A) (2) because they never applied for a home study program as outlined by this statute. As stated by the Ohio Supreme Court in Whisner, supra:

> [It is encumbent [sic] upon (defendants) to demonstrate the manner in which the state ... infringed upon their free exercise of religious liberty. Id at 200.

Upon cross-examination, both defen-

dants admitted they could not state how the Columbiana Exempted Village School System's home study program would infringe on the beliefs they outlined in their testimony. Neither defendant tried to work within the law to amicably resolve their differences with the State concerning education. Therefore, the defendants did not demonstrate infringement upon constitutional rights as result of any action by the Columbiana Exempted Village School System or personnel as result of aplication [sic] of any "minimum standards", school policy or refusal by the school to approve home based education because no request therefor [sic] was made by defendants as permitted by 3321.04. See OJA, supra, at 4.

The defendants can not claim as a defense or absolution from criminal prosecution, pursuant to a violation of ROC

3321.03, that their daughter receives comparable education to that being provided by a public or private school meeting state minimum standards.

First, equivalency of eduation [sic] is not one of the enumerated exceptions to compulsory education laws. As noted in Akron v Lance, 65 Ohio App 3d 90, 93, (1979):

> The exceptions from compulsory attendance are listed in R. C. Section 3321.03(A), (B), and (C). Mere equivalency between home instruction and public education is not an exception listed in the statute. The allowance of a home instruction exception is discretionary with the district superintendent of school, subject to state direction, R. C. Section 3321.04 (A) (2) and subject to appeal to the Juvenile Court, Revised Code 3321.08. Whether defendant's home instruction program is equivalent to the education provided by the Akron Board of Education was, therefore, immaterial to the instant prosecution.

This principle was also reaffirmed by the Court of Appeals of the Seventh Ap-

pellate District in the case of Skaggs v Pontuti, supra, at page 7 of the court's opinion. ("Equivalency between home instruction and public education is not an exception as listed in R. C. Section 3321.03 (A-C) . . .")

Secondly, equivalency between home instruction and public education is not relevant in the present proceedings. Ohio Revised Code Section 3321.04 (A) (2) provides for a "home instruction" exemption with rights of appeal of the school district's decision to the Juvenile Court. The defendants herein did not seek that available remedy. Therefore, since the defendants failed to exhaust their administrative remedies, the issue of whether or not the home instruction program conducted by the defendant is equivalent to public education is not relevant to the issue of whether or not

the defendants complied with O.R.C. Section 3321.04 (A) (2).

In comparison, equivalency of education would be relevant in the proceeding wherein the defendants appealed an adverse decision of the superintendent regarding a denial of a home study program. Therein the issue would be whether or not the aplication [sic] should have been denied.

In the present case, regardless of whether Sara is in fact being adequately educated, the defendants have violated Ohio Revised Code Section 3321.03 because they have not complied with the procedures outlined in Section 3321.04 (A) (2).

In summation, the state's oral Motion in Limine to preclude evidence regarding equivalency of education was well-founded.

In closing, it must not be overlooked that the compulsory attendance laws of Ohio serve a public policy of the highest possible order: namely, that all children receive an education which enables them to serve productivity [sic] as members of society and to fulfill their own personal potential. As the Ohio Supreme Court declared in State v Gans, 168 Ohio St. 174, 181 (1958):

> These sections of the Code exemplify another public policy of this state, which that is our free civilization in this country and in this state will maintain itself and advance only as its members become education so as to be able to add their knowledge to that of their forefathers and thus progress.

[sic]

This vital public policy simply cannot be served if parents, at their whim, are permitted to withdraw their children from the public schools. Exceptions to compulsory education must be narrowly

construed and subject to the reasonable control of public school officials as prescribed by Revised Code Section 3321.04; otherwise, the concept of compulsory education will have little meaning. This was quickly recognized by the Delaware County Juvenile Court in the OJA case cited above:

> Home instruction is permitted only upon approval by the school district upon request according to procedures of Section 3321.04. This provides for the balance of public need to assure good education versus uncontrolled withdrawal of students for home instruction which could be claimed by anyone, anytime, for any reason, with poorer education of youths resulting by home education as fiction, rather than fact, Section 3321.04 provides for case by case consideration on individual applications. No other control of home instruction is possible but on an individual basis of consideration.

Clearly, the state of Ohio can ill-afford the kind of unregulated mail-order education for which defendant now seeks this court's stamp of approval. The cost

is simply too high -- not only in societal terms, but also (for those children who are victimized) in individual human terms as well. The state would have no mechanism for assuring that children in a home with their parents are provided access to any education whatsoever. In fact, a parent could claim to be providing education, but later recant when parental demands may hinder or prevent the children from being instructed.

With home instruction unregulated by the state, the children alone are the consumers, virtually helpless to protect their interests in an adequate education.

Granted the defendants may be adequately educating Sara. But how can the state insure that every child has an education not just at the whim of a parent? The court certainly has not the time or resources to investigate in order

to ferret out those children in a home study program and to continually monitor the parents to ensure the child is in fact receiving an adequate education.

No other control of home instruction is possible but on an individual basis by a public school administrator who must answer by law to the state and whose decision is appealable to the court system if unjustly denied.

In summation, there has been a discussion of only two rights - the parents' religious freedom and the state's interest in compulsory education. The most important rights are those of the child. Every child has a right to be educated so that he can reach his full capacity. A mind is a terrible thing to waste. Without any safeguards to insure quality education, a child may be denied its rights in deference to the religious

beliefs of the whims of the parents. The deprivation of education causes irreparable harm to the child and society who has lost a productive citizen.

Ohio, as one of the most liberal states regarding compulsory education, provides an option - home study - which equally protects all the interests of each group - the child, the parent, the state. The state's intrusion into the ambit of parental rights to instruct their child in a religion of their choice is not infringed upon. By the necessity of living within a society, one must live within the parameter of its laws and no parent can infringe upon the separate rights of his child.

A child, by their very immaturity, can not assert their rights, especially if those rights conflict with parental decisions. Therefore, the state must

maintain some control over home study programs to assure that children receive one of the necessities to survive modern life - Quality Education.

Respectfully submitted,

/s/

Melissa Byers, Esq.
Assistant Prosecuting
Attorney
Columbiana County
Courthouse
Lisbon, Ohio 44432

Supreme Court, U.S.
FILED
OCT 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD and PAMELA SCHMIDT,

Petitioners,

v.

OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

ROBERT L. HERRON
Columbiana County Prosecutor
Columbiana County Courthouse
Lisbon, Ohio 44432
(216) 424-9511
Attorney for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Are criminal defendants precluded from attacking the constitutionality of a regulatory statute when they are prosecuted for failure to obtain government approval under said statute?

2. Is Ohio law void for vagueness, thereby violating the Due Process Clause, by granting local school superintendents the right to permit or deny a request to home school a child if in his unfettered and undefined discretion the parent is "qualified" to teach?

3. Does Ohio law violate the Due Process Clause by yielding a decision concerning the exercise of fundamental rights to a person with a financial stake in the outcome of the decision?

4. Is a criminal prosecution for the exercise of one's religious beliefs sufficient to demonstrate a "burden" under this Court's Free Exercise tests?

PARTIES

Petitioners are Richard Schmidt (OH. S. CT. No. 86-263) and Pamela Schmidt (OH. S. CT. No. 86-263). Respondent is the State of Ohio.

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STATUTES:

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WHEN A STATE STATUTE PROVIDES FOR A BALANCING OF INDIVIDUAL RIGHTS AND STATE INTEREST, TO BE MADE ON A CASE BY CASE BASIS UPON APPLICATION OF THE INDIVIDUAL, THE INDIVIDUAL, HAVING FAILED OR REFUSED TO MAKE APPLICATION AND THUS PREVENTED A BALANCING OF INTERESTS TO OCCUR, CAN BE PRECLUDED FROM CHALLENGING THE CONSTITUTIONALITY OF THAT PORTION OF SUCH STATUTE.

Ohio law requires that all children between the ages of six and eighteen years of age must attend school. Ohio Revised Code Section 3321.03 mandates that:

> Except as herein provided in this section, the parent of a child of compulsory school age shall cause such child to attend a school in the school district in which the child is entitled to attend school under division (B) of Section 3313.64 or Section 3313.65 of the Revised Code, to participate in a special education program under Chapter 3323 of the Ohio Revised Code, *or to otherwise cause him to be instructed in accordance with law.* (Emphasis added)

The duty to attend school may be excused in very limited cases. Exceptions from the compulsory attendance requirements of ORC Section 3321.03, including home instruction, are outlined in Ohio Revised Code Section 3321.04, which reads in pertinent part as follows:

> Excuses from future attendance at our past absence from school or a special education program may be granted for the causes, by the authorities, and under the following conditions:

(A) *The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:*

(2) *That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require.* In each case the issuing superintendent shall file in his office, with a copy of the excuse, papers showing how the inability of the child to attend school or a special education program or the qualifications of the person instructing the child at home were determined. *All such excuses shall become void and not subject to recall upon the removal of the disability of the child or the cessation of proper home instruction; and thereupon the child or his parents may be proceeded against after due notice whether such excuse be recalled or not . . .* (Emphasis added)

As discussed in detail herein in Arguments of Law numbers II and IV, dealing specifically with those issues, Ohio Revised Code Sections 3321.04 (A)(2) is neither void for vagueness nor violative of the First Amendment right to free exercise of religion.

A full review was afforded Petitioners by the Supreme Court of Ohio in connection with their challenge for vagueness. With respect to that issue, the Supreme Court of Ohio stated:

> Finally, the requirement, under R.C. 3321.04 (A)(2), that the approval of the local superintendent must be obtained before removing a child from school to a home education program is not vague. Appellants knew that the law required them to request Superintendent Stiller's approval in order to educate Sara at home.

The Supreme Court of Ohio further stated, with respect to the vagueness issue, that:

> The statute gives the superintendent an intelligible principle for his guidance and the desirable flexibility to accommodate home education programs that parents such as appellants and those similarly situated may wish to pursue. An arbitrary and capricious refusal by the superintendent can be measured and corrected in the appeal procedure provided by O.R.C. 3331.08.

As indicated, Ohio, unlike a majority of states, permits "home instruction" under certain circumstances including religious reasons. A parent is *not* mandated by Ohio's Compulsory Education Laws to choose between only two options—sending a child to a public or to a private school which complied with Ohio's minimum standards. A parent has a third option, to instruct their child at home in accordance with their religious beliefs. However, the parent must request and receive approval from the school district *before* withdrawing their child for home study.

When confronted with a religiously based request for exemption, a superintendent must apply the three-pronged test enunciated in *Wisconsin vs Yoder,* 406 U.S. 205 (1972) and adopted by the Ohio Supreme Court in *State vs Whisner,* 47 Ohio St. 2d 181 (1976):

(1) are the religious beliefs sincere?

(2) will application of the compulsory school attendance law infringe on the constitutional right to free exercise of religion?

(3) does the state have an interest of sufficient magnitude to override the claim of violation of the right to free exercise of religion?

If the parent can meet the first two prongs of the test, *and* if the state fails to meet the third, the exemption must be granted.

The State of Ohio, in O.R.C. Section 3321.04 (A)(2), has established a means for balancing the First Amendment free exercise rights of the individual with the compelling interest of the State to impose reasonable regulations for the control and duration of basic education by providing for case by case consideration with respect to home study, to be made upon application by the individual.

In reviewing the Petitioners challenge that O.R.C. 3321.04 (A)(2) violates the First Amendment right to free exercise, the Ohio Supreme Court properly followed the balancing test mandated by this Court in *Yoder,* supra, and adopted by *Whisner,* supra. The review by the Ohio Supreme Court of the aforesaid balancing test and its application to the facts of this case is found at the Appendix to the Petition herein, at 5a-9a.

The Ohio Supreme Court properly held that:

> This court will not speculate as to what result the superintendent would have reached had appellants submitted a proposal. We will not pre-

> sume that the superintendents' actions would have been unconstitutional. . .
>
> The case *sub judice* does not fall within the reach of *Wisconsin* vs. *Yoder,* (1972), 406 U.S. 205, wherein the United States Supreme Court enunciated a standard consistent with our holdings in *Whisner* and *Olin,* supra. Here, as distinguished from *Yoder,* appellants have made a unilateral decision to ignore the plain requirement that an application for their home education proposal be submitted.
>
> Without an application by appellants and without a proposal to the superintendent, there is no way to balance appellants' right to the free exercise of their religion in respect to Sara's education against the state's interest, albeit by least restrictive means, in her education. We therefore do not reach the third prong of the test in *Whisner.*
>
> We hold that the requirement under R.C. 3321.04 (A)(2), that parents must seek the approval of the local superintendent for their home education program in order to obtain an excuse from the compulsory attendance laws, reasonably furthers the state's interest in the education of its citizens and does not infringe upon the free exercise of religion.

O.R.C. Section 3321.04 (A)(2) is, on its face, constitutionally valid. Pursuant to the mandates of this Court and the Ohio Supreme Court, it provides for a balancing of individual and state interests, to be initiated by means of an application by the parents,

and provides intelligible standards to be employed in connection therewith.

Although the means were available to the Petitioners to have their religious beliefs afforded consideration in connection with the matter of home education for their daughter, they chose not to make application, a requirement of which they were aware. Due to the Petitioners' refusal to make application no balancing test could be made and there could be no showing by Petitioners, as required by *Yoder,* supra, that there was an infringement of their right to the free exercise of religion. Under such circumstances, the Ohio Supreme Court properly determined not to speculate as to what action would have been taken had application by the Petitioners been made.

II. OHIO REVISED CODE SECTION 3321.04 (A)(2) IS NOT UNCONSTITUTIONALLY VAGUE.

ORC 3321.04 (A)(2) is not unconstitutionally vague. A recent unreported Court of Appeals case, *Fresh v Searcy,* Case No. 1172, Court of Appeals, Ashtabula County (dated April 5, 1985), held that ORC 3321.04 (A)(2) explicitly states the circumstances under which home instruction is permitted and compulsory attendance is excused and is therefore not unsconstitutionally vague. As the Court in *Fresh* pointed out, religious oriented requests, as well as secular, are within the contemplation of ORC 3321.04 (A)(2). Once the Superintendent where the child resides finds the curriculum is educationally adequate and the instructor is competent to teach those subjects, home instruction must be permitted.

The legislature has promulgated a statute that is general enough to afford parents the ability to meet

the requirements but which also upholds the state's interest in compulsory education.

Respondent respectfully submits that ORC 3321.04 (A)(2) comports with all constitutional requirements because it explicitly allows home instruction, enumerates under what circumstances this exception applies and specifies the right of redress if dissatisfied.

Ohio has clear and unequivocable rules governing home study programs. The Ohio Supreme Court in *State vs. Whisner,* 47 Ohio St. 2d 181 (1976) has set forth explicit rules and regulations governing home study programs. Also, the Ohio State Board of Education has promulgated minimum standards which specifically outline the course of study, hours per day in attendance, and qualification of teachers. Lastly, Ohio provides for judicial review of a Superintendent's decision whether or not to grant a home study exception and his method of supervising that program. Thus, Ohio has already provided a mechanism to prevent a public school superintendent from acting in an arbitrary and capricious manner.

The Petitioners in this case never applied for a home study exemption with Superintendent Stiller. In fact, Mrs. Schmidt stated she had been instructed by attorneys and Mr. Moody not to apply for an exemption or to even make Superintendent Stiller aware that Sara was not attending school! The Schmidts could have resolved this matter within the ambits of the law by working within the law. If dissatisfied with Superintendent Stiller's decisions regarding home study, the Schmidts had the ability to appeal his decision to the juvenile court. See Ohio Revised Code

Section 3321.04 (A)(2). The Petitioners, though well aare of the applicable law, chose to ignore it.

III. THE ISSUE OF DELEGATION OF DECISION MAKING AUTHORITY TO AN OFFICIAL WITH A FINANCIAL STAKE IN THE OUTCOME WAS NOT RAISED, CONSIDERED, OR RULED UPON IN THE SUPREME COURT OF OHIO OR THE OHIO COURT OF APPEALS, AND, THEREFORE, IS NOT PROPERLY PRESENTED TO THIS COURT FOR CONSIDERATION.

It is the general rule, that, in the absence of extraordinary circumstances, the United States Supreme Court will not consider an issue raised for the first time in the Supreme Court. *Tacon v. Arizona,* 410 U.S. 351 (1973), *Lawn v. United States,* 355 U.S. 339 (1958), *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940), *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

As the issue stated above was not raised, considered or ruled upon in the Supreme Court of Ohio or in the Ohio Court of Appeals, it is not properly raised for consideration by the United States Supreme Court.

IV. OHIO REVISED CODE SECTION 3321.04 (A)(2) DOES NOT VIOLATE THE FIRST AMENDMENT RIGHT TO FREE EXERCISE OF RELIGION.

The Petitioners are attacking the compulsory school attendance laws of this state by declaring they do not have to comply with Ohio Revised Code Section 3321.04. The State of Ohio in *Parr vs. State,* 117 Ohio St. 23 (1927) upheld the constitutionality of compulsory education statutes. Numerous decisions of the Supreme Court of the United States have clearly sounded the death knell to the petitioners' assertion that the State is devoid of all powers to promulgate

and enforce reasonable regulations affecting the education of its citizens.

Each state has the power to enact legislation to regulate the conduct of its citizens for the common good. Accordingly, every power will necessarily either interfere or limit a person's constitutional rights, all constitutional protections are subject to the police powers and may be regulated as long as the goal bears a real and substantial relation with the welfare, safety or health of the state's citizenry. See *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540 and *Palmer v. Tingle*, 55 Ohio St. 423.

It is elementary that freedom of religion has a dual aspect, (1) freedom to believe, and (2) freedom to act in exercise of such beliefs. The Constitution of the United States and Ohio recognized that the right to religious beliefs are fundamental and absolute. The exercise of those beliefs, however, is not an absolute right but may and has been regulated by the State's Police powers for the general welfare of society. If it were otherwise, every professed religious doctrine or religious belief would be superior to the law and every citizen would become a law unto himself. Thus government would cease to exist.

Compulsory education is the very foundation of good citizenship and as such, it is the keystone to our democratic society. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

The United States Supreme Court, as early as 1925 upheld, without question, the right of State to require a child to be education and to regulate the educational process. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court stated:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils, to require that all children of proper age attend some school . . . *Id.* at 532

Since *Pierce*, the United States Supreme Court has repeatedly recognized [t]he power of the State to Compel "attendance at some school and to make reasonable regulations for all schools." *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927). These three Supreme Court Decisions set the due process framework for the constitutional limits of parental choice in the education of their children and the state's rights to make fundamental educational decisions.

In fact, the United States Supreme Court has consistently held that the state has the power to promulgate and enforce reasonable regulations affecting the education of its citizens even if religious beliefs are involved. In *Board of Education vs. Allen*, 392 U.S. 235, 245 (1968) the Court stated:

> "A substantial body of case law has confirmed the power of the states to insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction . . . [and that] if the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those

> schools perform their secular educational function."
>
> More recently, *Wisconsin v. Yoder*, 406 U.S. 205, 213, 236, held:
>
> "There is no doubts as to the power of a state, having a high responsibility for education if its citizens, to impose reasonable regulations for the control and duration of basic education. Nothing we hold is intended to undermine the general applicability of the state's compulsory school-attendance statutes."

No Supreme Court case or Ohio Supreme Court case has disputed that the State has a fundamental interest in enforcing compulsory education. In fact, *Parr v. State*, 117 Ohio St. 23, 157 NE. (1927) and its progeny stated that a balancing test must be used to weigh the competing interests of the State and parental control of education. *Parr* weighed the balance in favor of the State.

> Compulsory education laws have very generally been upheld by the courts. Statutes making the education of children compulsory have become general in the United States, and their *constitutionality is beyond dispute for the natural rights of a parent to the custody and control of his infant child are subordinate to the powers of the state* and may be restricted and regulated by laws. . . .
>
> Additional authorities might be cited in support of this proposition, but we regard the constitutionality of such laws as so well established that other citation is unnecessary.

> *Id.* at 26, 157 N.E. at 556 (emphasis added) See also *State vs. Whisner*, 47 Ohio St. 2d 181, (1976)

The scales are tipped in favor of the state's police power to regulate education. The parents bear the burden of proving that the statute deprives them of their constitutional rights.

Mr. & Mrs. Schmidt merely assert they are immune from the requirement to apply for home study under ORC 3321.04. This mere assertion is not enought to establish the state's constitutional invalidity. The Schmidts' contend that the mere application for home study is contrary to their religious beliefs. This is contrary to the well established principle that the state does in fact have a compelling state interest to insure a minimum education.

Petitioners contend their religion prevents them from having to be regulated by the state, no matter how slight, regarding the education of their daughter. Petitioners' contentions have been repeatedly struck down in the past by decisions of the Ohio Supreme Court. the Court in *State vs. Whisner*, 47 Ohio St. 2d 181 (1976), recognized that the state has a legitimate interest in ensuring its citizens are educated. Whisner stated:

> "Numerous decision of the Supreme Court of the United States over the years have clearly sounded the death knell with respect to any such assertion . . . that the state is devoid of all power to promulgate and enforce reasonable regulations affecting the operation of non-public schools." *Id.* at 197.

Whisner also stated:

> "The State's interest in education quality is an important one, to be characterized as "compelling" so as to overbalance, legitimate claims to the free exercise of religion, the state must demonstrate that a regulatory implementation of that interest is such that the state's interest cannot otherwise be served."

A more recent Ohio Supreme Court case corroborated the court's traditional stance regarding the educational interests of the State. In *State, Ex rel., Nagle vs. Olin*, 65 Ohio St. 341, 354 (1980) the court held:

> We note . . . that in *State vs. Whisner we emphasized the prima facie reasonableness of the Ohio Compulsory Education enabling legislation particularly Ohio Revised Code Section 3301.07 which mandates that non-public schools provide a general education of a high quality. Thus, it would appear that standards may properly be devised which are designed to assure achievement by students in a wide range of subject areas.* (Emphasis added)

The *Olin* Court also explained why the state has a legitimate interest to assure citizens receive a quality education. The Court held:

> Both this Court and the United States Supreme Court have recognized the importance to the state of assuring that children receive quality educations, enabling them to intelligently undertake the obligations of citizenship. Id. at 510.

The religious belief of the Schmidts are not comparable to that of the Amish parents in *Yoder*. Where

the Amish community had maintained a long-standing religious code of beliefs, the Schmidts espouse a personal belief, one not shared by their church or pastor. In fact, Mr. and Mrs. Schmidt admitted upon cross-examination that their beliefs are not supported by their church or pastor and that their church and pastor do not support the premises that self-instruction is the only religiously acceptable means of education. In fact, the majority of the children of their church attend public or private schools.

The Supreme Court made clear in *Yoder* that personal or philosophical objections to state regulations do not qualify for first amendment protections. The Court emphatically stated: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." 406 U.S. at 215. Therefore, the Schmidt's beliefs are not fundamental rights which by the very assertion, can entirely replace state compulsory education.

Petitioners' religious beliefs may be sincerely held. However, Petitioners have ignored the balancing test outlined in *Yoder, supra,* at 219 and adopted by *Whisner, supra,* at 200. When confronted with a religiously-based request for exemption from compulsory school attendance under Revised Code section 3321.04, the local superintendent of schools must apply the three-pronged test enumerated in *Wisconsin vs. Yoder, supra,* and adopted by Ohio Supreme Court in *State vs. Whisner, supra,* namely: (1) are the religous belief sincere? (2) will application of the compulsory school attendance law infringe on the constitutional right to free exercise of religion? (3) does the state have an interest of sufficient magnitude

to override the claim of violation of the right to free exercise of religion? *If the parent can meet the first two prongs of the test, and if the state fails to meet the third, the exemption must be granted,* (Emphasis added)

As Whisner emphasized:

> [The fact that appellant's religious beliefs are truly held does not end, but rather serves only to begin our inquiry.] 47 Ohio St. 2d at 200

The Schmidt's have not conclusively proven that the state, in applying its law, infringes upon their constitutional rights. Until the Schmidts have met this burden, the state has no burden of proof.

Petitioners cannot demonstrate infringement upon constitutional rights as a result of Ohio Revised Code Section 3321.04 (A)(2) because they never applied for a home study program as outlined by this statute. As stated by the Ohio Supreme Court in *Whisner, supra:*

> [It is incumbent upon (defendants) to demonstrate the manner in which the state . . . infringed upon their free exercise of religious liberty. *Id* at 200.

Upon cross-examination, both Petitioners admitted they *could not* state how the Columbiana Exempted Village School System's home study program would infringe on the beliefs they outlined in their testimony. Although Superintendent Stiller, on numerous occasions offered to meet with the Schmidts to review the matter. Superintendent Stiller offered the Schmidts the opportunity to visit a public school—but they refused. Petitioners also refused to provide Su-

perintendent Stiller with Sara's course program for his review. The Schmidt's, by their uncooperation with Superintendant Stiller, have no idea whether his review would be intrusive. Neither Petitioner tried to work within the law to amicably resolve their differences with the State concerning education. Therefore, the Petitioners did not demonstrate infringement upon constitutional rights as result of any action by the Columbiana Exempted Village School System or personnel as result of application of any "minimum standards", school policy or refusal by the school to approve home based education because *no* request therefore was made by the Petitioners to the public superintendent as permitted by Section 3321.04.

Petitioners cannot successfully claim that *Whisner* and *Olin* support their position that Ohio Revised Code Section 3321.04 (A)(2) infringes upon their constitutional rights of freedom of religion. First, the Ohio Supreme Court in *Whisner, supra,* and Nagle vs. Olin, 64 Ohio St. 2d 341 (1980), made it clear that the State may regulate education and that when the then existing minimum State Board Standards were redesigned, any conflict between religious freedom and the state's interest in compulsory education would be eliminated.

> We held in *State vs. Whisner* that the minimum standards then in effect "overstep the boundary of *reasonable* regulation as applied to a non-public religious school." *Id.*, at 204. Despite our holding, the State Board of Education has not adopted new standards for application to non-public schools which, while adequate to assure the provision of "a general education of a high quality," R.C.

> 3301.07(D), do not simultaneously suffocate "in dependent thought and educational policy," *State vs. Whisner, supra,* at page 215, or abrogate parents liberty to direct the education of their children, *Id.* at page 218
>
> We believe that such a set of less-restrictive standards could be adopted . . . We note . . . that in *State vs. Whisner* we emphasized the *prima facie* reasonableness of the Ohio compulsory education enabling legislation, particulary Revised Code Section 3301.07 which mandates that non-public schools provide a *general* education of a *high* quality. Thus, it would appear that standards may properly be devised which are designed to assure achievement by students in a wide range of subject areas.
>
> Our decision today, as in *State vs. Whisner,* demonstrates simply that *until such time as the State Board of Education adopts minimum standards which go no further than necessary to assure the state's legitimate interests in the education of children in private elementary schools,* the balance is weighted, *ab initio,* in favor of a First Amendment claim to religious freedom.

Olin, supra, 64 Ohio St. 2d at 353-355 (emphasis added).

Significantly, the State Board Standards found to have infringed parental rights in *Whisner* and *Olin* have since been replaced with less restrictive regulations as envisioned by the Ohio Supreme Court. Thus, the problems with State Board Standards de-

scribed in *Whisner* and *Olin* cases have been remedied, and State Board Standards can no longer be cited as the basis for any infringement on constitutionality protected right in this area.

According to *Whisner* and *Olin, supra,* once the minimum standards have been changed, the State's interest in compulsory education is "compelling" and the balance between individual religious rights and state rights is weighted, *ab initio,* in favor of the state. In fact, the Ohio Supreme Court confirmed the state's interest to insist that children attend school, to attend for a minimum of hours of instruction, to be taught by teachers of specified training and to be taught certain subjects. *Whisner, supra* at 197.

Petitioners contend the State of Ohio has not established a compelling state interest. The State has established a compelling interest as outlined by the Supreme Court. In *Yoder*, the Supreme Court mandated that a state has a compelling interest in providing access to education for all in order to prepare future citizens to "participate effectively and intelligently in our political system and (2) to be self-reliant and self-sufficient participants in society. 406 U.S. at 221. Without any means of control over education, the State would have no means by which to insure children are in fact receiving an education.

The Ohio Compulsory Education Statute accommodates first amendment free exercise rights in that ORC Section 3321.04 does not preclude a home study exception based on religious beliefs but merely sets forth the circumstances under which a child may be excused from attendance at public or private schools that meet state minimum requirements. In short, Section 3321.04 balances the public's need to assure good

education with the uncontrolled withdrawal of students for home instruction which could be claimed by anyone, anytime, for any reason.

If the Court follows the Petitioners' premises, the State would lose all control over education and the compulsory education law would be a joke. The State would not be able to ascertain whether or not a child was receiving any education, let alone whether the education was adequate. The court is well aware that not every parent, regardless of sincerity, is capable of teaching their children academic courses. The State of Ohio has given differences to religious beliefs of parents by providing a third alternative from sending a child to a public or private school—a "home study" program. The State of Ohio has provided a least restrictive alternative which affords parents religious freedoms without abrogating all state control. Ohio Revised Code Section 3321.04 (A)(2) provides for a case by case consideration on individual applications for home study based upon religious reasons. No other control of home instruction can afford more deference to an individual's religious beliefs than a decision made on an individual basis of consideration by a superintendent that by law has a duty to enforce Ohio's Compulsory Education Laws—the superintendent of the school district where the child resides. Religious freedom is a key consideration in determining whether to grant a home study exemption. See *State vs. OJA*, Case #82-684-SLV (January 7, 1983) (C.P. Delaware City.,-Juv. Court).

It must not be overlooked that the compulsory attendance laws of Ohio serve a public policy of the highest possible order: namely, that all children receive an education which enables them to serve pro-

ductively as members of society and to fulfill their own personal potential. As the Ohio Supreme Court declared in *State vs. Gans*, 168 Ohio St. 174, 181 (1958):

> These sections of the Code exemplify another public policy of this state, which that is our free civilization in this country and in this state will maintain itself and advance only as its members become educated so as to be able to add their knowledge to that of their forefathers and thus progress.

This vital public policy simply cannot be served if parents, at their whim, are permitted to withdraw their children from the public schools. Exceptions to compulsory education must be narrowly construed and subject to the reasonable control of public school officials as prescribed by Revised Code Section 3321.04; otherwise the concept of compulsory education will have little actual meaning. This was recognized by the Delaware County Juvenile Court in *State v. OJA*, supra:

> Home instruction is permitted only upon approval by the school district upon request according to procedures of Section 3321.04. This provides for the balance of public need to assure good education versus uncontrolled withdrawal of students for home instruction which could be claimed by anyone, anytime, for any reason, with poorer education of youths resulting by home education as fiction, rather than fact, Section 3321.04 provides for case by case consideration on individual applications. No other control of

home instruction is possible but on an individual basis of consideration.

Clearly, the State of Ohio can ill-afford the kind of unregulated mail-order education for which Petitioners now seek this court's stamp of approval.The cost is simply too high—not only in societal terms, but also for those children who are victimized because the state has not used all reasonable efforts to insure that every child is afforded an education. The state would have no mechanism for assuring that children in a home with their parents are provided access to any education whatsoever. In fact, a parent could claim to be providing education, but later recant when parental demands may hinder or prevent the children from being instructed.

With home instruction unregulated by the state, the children alone are the consumers, virtually helpless to protect their interests to acquire an adequate education.

Granted the petitioners may be adequately educating Sara. But how can the state ensure that every child has an education, not one just at the whim of a parent? The court certainly has not the time or resources to investigate in order to ferret out those children in a home study program and to continually monitor the parents to ensure the child is in fact receiving an adequate education. Without state supervision, a parent could claim to be providing minimum curriculum, using certain texts and keeping a regular teaching schedule, but parental demands or lack of teaching expertise may prevent the child from obtaining a quality education. If the state does not oversee home instruction, our children are virtually

helpless to protect their interests in an adequate education.

No other control of home instruction is possible but on an individual basis by a public school administrator who must answer by law to the state and whose decision is appealable to the court system if unjustly denied.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

ROBERT L. HERRON
Columbiana County Prosecutor
Columbiana County Courthouse
Lisbon, Ohio 44432
(216) 424-9511

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No. 87-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD and PAMELA SCHMIDT,
Petitioners,

v.

OHIO,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MICHAEL P. FARRIS
President
Home School Legal Defense Association
731 Walker Road
Suite E2
Great Falls, VA 22066
(703) 759-7577
Attorney for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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No. 87-62

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD and PAMELA SCHMIDT,

Petitioners,

v.

OHIO,

Respondent.

REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

ARGUMENT

I

OHIO CITES NO AUTHORITY FOR THE PROPOSITION THAT A PERSON CANNOT RAISE CONSTITUTIONAL CHALLENGES TO A LICENSING STATUTE WHEN PROSECUTED FOR FAILURE TO SEEK A LICENSE

The prosecuting attorney was directed by the Court to file a brief in opposition to our petition for a writ of certiorari after previously having waived

response. We file this reply brief to respond to the arguments raised in the requested brief.

The State of Ohio contends that its Supreme Court correctly held that a person may not challenge the constitutionality of a statute requiring advance government approval of home schooling unless there has been an attempt to secure government approval and such approval has been denied. No cases are cited by the State of Ohio for this proposition. The crux of their argument is that such an application is necessary for a "balancing process" required in First Amendment analysis.

We note that our primary argument in this case has always been that the Ohio law is void for vagueness because each local school superintendent is permitted to enforce whatever self-created stan-

dards he desires for approval or disapproval of a home schooling request. There is no "balancing process" required in void for vagueness analysis. Superintendents can approve those they deem qualified and reject those deemed unqualified for reasons that exist solely in their own minds.

Nothing in this Court's void for vagueness decisions requires a person to submit to such a process as a precondition to challenging the law on constitutional grounds in a criminal prosecution brought to enforce the statute.

The dissenting judges in the State Supreme Court correctly pointed to this Court's decisions in Thornhill v. Alabama, 310 U.S. 88 (1940); Staub v. Baxley; and Lovell v. Griffin, 303 U.S. 444 (1938), for the proposition that, "[o]ne who might have had a license for the

asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it." Thornhill, 310 U.S., at 97.

The prosecutor argues that the Ohio Supreme Court was correct when it said, "The case sub judice does not fall within the reach of Wisconsin v. Yoder, 406 U.S. 205 (1972)." The alleged distinguishing reason is that the Schmidts failed to apply for a religious exemption and thus could not raise substantive constitutional arguments. However, this misreads Yoder. In Yoder, just as here, the families did not comply with the existing law regulating compulsory education and raised their substantive constitutional challenges as defenses to criminal prosecution for truancy. That is the exact same posture as present in this case. The Schmidts have been criminally

prosecuted. There is no reason to distinguish these cases in such a way as to preclude the Schmidts the right to raise substantive constitutional defenses.

No cases were cited by Ohio to demonstrate that the dissenters in the State Supreme Court were not correct on this matter. This Court's decisions have not been followed by the majority of the State Supreme Court. Certiorari is necessary to review this matter on this crucial point.

II

THE PROSECUTOR SERIOUSLY MISSTATES OHIO LAW IN AN ATTEMPT TO AVOID OUR VOID FOR VAGUENESS ARGUMENTS

The State of Ohio cites the case of an unpublished decision Fresh v. Searcy, Case No. 1172, Court of Appeals, Astabula County, (April 5, 1985) for the proposition that Ohio's law is not unconstitu-

tionally vague. That decision makes no such holding nor does it even discuss the issue of vagueness.[1]

However, another recent unpublished opinion, In the Matter of Appeal of Zelda Snyder,[2] Court of Appeals, Fifth Appellate District (Knox County), November 20, 1986, did discuss the issue of vagueness and reached the conclusion that Ohio Rev. Code § 3321.02 (A) (2) is unconstitutionally vague.

> The legislature has provided no standards for the guidance of superintendents in their passing on requests for home instruction excuses in § 3321.04 (A) (2). . . . The state board of education has promulgated no standards in compliance with the dictates of § 3321.03 (C) as to home

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[1]We reproduce this decision in the Appendix at 21a. (Note: all decisions reproduced in the Appendix are quoted in full, and typographical, grammatical, and other errors have been included without the addition of "sic" at each occurrence.)

[2]We reprint this decision in its entirety in the Appendix beginning at 1a.

> teaching which is authorized under § 3321.04 (A) (2).
>
> . . .
>
> As to instructor competency, the statutory requirement is only that the instructor be qualified to teach the subjects "in which instruction is required" but provides no standard to determine what constitutes being qualified to teach one's own children.
>
> We agree with the trial court that § 3321.04 (A) (2). . ., sets "no guidelines, no limits" and "is too vague to be of any assistance to the Superintendent in the exercise of [his] judgment."

Appendix at 14a-18a.

The assertion of the Prosecuting Attorney that "Ohio has clear and unequivocal rules governing home study programs", Brief In Opposition, at 7, is obviously false in light of the Ohio Court of Appeals' statements in Snyder just quoted. Contrary to the assertions of the Prosecutor, Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976), does not give "explicit rules and regula-

tions concerning home schooling." This case does not even concern home schooling. In fact it held that Ohio law was unconstitutional as applied to religious schools because of excessive regulations. It is simply unconscionable for the Prosecutor to attempt to misuse Whisner in such a blatant manner.

Moreover, his assertion that the State Board of Education "has promulgated minimum standards which specifically outline the course of study, hours per day in attendance, and qualification of teachers" is equally false. If such regulations exist it would have behooved the prosecutor to cite them. The Court of Appeals in Snyder said that no such regulations exist for home schools. If they did exist certainly the Supreme Court of Ohio would have cited them to answer the Schmidts' allegation that

there are no such regulations. The prosecutor's assertion is a naked fabrication.

In fact, the Legal Counsel for the Buckeye Association of School Administrators, (the State Association of Superintendents), has bemoaned the Schmidt decision for its failure to wrestle with the fact that there are no guidelines defining who is "qualified" to teach a child at home. In a regular publication[3] circulated to all administrators in Ohio, Robert T. Baker, Legal Counsel writes:

> [I]t is important to recognize what the Schmidt case does not do. It does not help school superintendents decide what is an acceptable home instruction program, or what a "qualified" instructor is. Nor does the Schmidt case tell a superintendent how far he can go before he will be deemed to have "infringed" the par-

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[3]This entire publication called "On Advice of Counsel", subtitled, "Getting A Handle on Home Instruction," is reprinted in the Appendix at 42a.

> ents' constitutional rights. In view of these uncertainties, I would counsel superintendents to make accommodations wherever possible on home instruction requests, and to avoid over-rigorous requirements which could be viewed as contrary to the spirit of the home instruction law or an infringement upon the parents' freedom of religion.

Appendix at 47a-48a. In this same publication, after quoting the statute in question, counsel for the state school administrators opines, "This language is obviously far from clear." Appendix at 44a. If the legal counsel for the State School administrators labels the term "qualified" an "uncertainty" and the statute itself "far from clear" in the law, it should be obvious that we are dealing with a law which is unconstitutionally vague. The prosecutor's misrepresentations of the state of the law in Ohio cannot be countenanced. Certiorari is necessary to review the con-

stitutionality of an obviously vague law which has been applied to convict the Schmidt's of a crime.

III

OUR DUE PROCESS CHALLENGE TO OHIO'S USE OF A FINANCIALLY INTERESTED DECISION-MAKER WAS RAISED BELOW

In our petition for certiorari we argue that Ohio law violates the Due Process Clause because it gives a due process decision to a person with a financial stake in the outcome. The prosecutor responds arguing that this issue was not raised in the State Court of Appeals or in the Supreme Court of Ohio. Brief in Opposition at 8. This is not the case. We have from the beginning of this case argued that giving the local school superintendent unbridled discretion to make a decision to approve or disapprove a home school violates the Due Process Clause. The argument that he has

a financial stake in the outcome is an argument supporting an issue which has been raised throughout.

To say that this was not raised in the Courts below is simply not true. For example, in the Supreme Court of Ohio brief filed by the Schmidts, this argument is specifically raised in support of our argument that the Due Process Clause has been violated by giving total discretion to the local superintendent on pages 50-51. We argued, inter alia:

> One of the principles of due process requires that when a person must come to the government for a decision, the citizen is entitled to a neutral decision maker who has no financial stake in the outcome. Tumey v. Ohio, (1927) 273 U.S. 510.

Brief of Schmidts before the Ohio Supreme Court at 50. We also cite the recent federal district court case of Fellowship Baptist Church v. Benton, 620 F.Supp. 308 (S.D. Iowa 1985); aff'd 815 F.2d 486 (8th

Cir. 1986), for this proposition. We quoted the following passage from the district court's opinion:

> The Court cannot leave this issue without pointing out other troubling matters. There may be problems when the responsibility of determining equivalent education is placed on local school boards even when it is more closely defined for two reasons. First each local school board may still have a different interpretation. Second, local school boards have an inherent conflict of interest since each student in a private school is potentially a source of additional state aid. Some other procedure might eliminate future litigation.

620 F. Supp. at 318. (Quoted at page 51 of said brief.)

We concluded our discussion of the Due Process Clause arguing:

> No local school superintendent should ever be allowed to decide whether an alternative form of education will be allowed to be practiced in his community. This is especially true when, as here, this decision is permitted to be made as a matter of "mere opinion" by a person with a financial stake in the outcome.

Brief at 51. It is clearly erroneous to argue that we raised this issue for the first time in this Court.

IV

WHILE WE RECOGNIZE A COMPELLING STATE INTEREST IN EDUCATION OHIO VIOLATES THE FREE EXERCISE CLAUSE BY BURDENING THE EXERCISE OF RELIGION WITHOUT EMPLOYING THE LEAST RESTRICTIVE MEANS OF ACHIEVING ITS GOAL

The Schmidts' free exercise arguments have been mischaracterized as "contend-[ing] their religion prevents them from having to be regulated by the state, no matter how slight, regarding the education of their daughter." Brief in Opposition at 12. At every stage of this proceeding, we have conceded that Ohio has a compelling state interest in the education of all children in the state. Our challenge is that Ohio has not adopted the least restrictive means in regulating home schooling. We point to the

twenty-two other states which have adopted statutes specifically dealing with home schooling to demonstrate that it is possible to achieve the state's interest in ensuring an adequate education without adopting a system which delegates unbridled discretion to local authorities.

There are twenty-two other states[4]

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[4]These states are: Arizona, Ariz. Rev. Stat. § 15-802, enacted 1982; Arkansas, Ark. Stat. § 80-1503.4, et seq., enacted 1985; Colorado, C.R.S. § 22-33-104 (2) (i) enacted in 1963; Florida, Chapter 85-144, Laws of Florida, F.S.A. § 228.041, enacted 1985; Georgia, Geo. Code Ann. § 32-2104 (b), enacted 1984; Louisiana, LSA-R.S. § 17:236.1, enacted 1984; Minnesota, Minn. Stat. Ann. § 120.101 (1987); Mississippi, Miss. Code Ann. § 37-13-91 (3) (c) enacted 1982; Missouri, § 167.031 R.S.Mo., enacted 1986; Montana, Mont. Stat. § 20-5-102 (2) (f) enacted 1983; Nevada, N.R.S. 392.070, enacted 1956, see also Nev. Admin. Code Chap. 392 §§ 2-8, issued in 1984; New Mexico, N.M.S.A. § 22-1-2 (U), and § 22-1-2.1, enacted 1985; Oregon, O.R.S. § 339.030 (6), enacted 1985; Rhode Island, § 16-19-1 General Laws of Rhode Island, enacted 1984; Tennessee, T.C.A. § 49-6-3050, enacted 1985; Utah, Utah Code Ann. § 53-24-1 (2), enacted 1957;

which have adopted statutes specifically dealing with home schooling since 1956.

In reaching a decision on the least restrictive means issue, this Court has often looked to the experience of other states as a part of the evaluation of a claimed compelling state interest. See, e.g., McDaniel v. Paty, 435 U.S. 618 (1978). In McDaniel, the Court held that although many states once held the view that clergy disqualification was necessary for the good of the principles of disestablishment,

> The essence of this aspect of our national history is that in all but a few States the selection or rejection of clergymen for public office soon

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Vermont, V.S.A. § 1121 (2), enacted 1987; Virginia, Code of Virginia § 22.1-254.1, enacted 1984; Washington, R.C.W. § 28A.27.010 (4), enacted 1985; West Virginia, W.Va. Code § 18-8-1, enacted 1987; Wisconsin, 1983 Wisconsin Act 512, Wisc. Stat. § 115.01 (1r), § 118.15 (4), § 118.165 (1), enacted 1983; Wyoming, W.S. § 21-4-101, et. seq., enacted 1985.

> came to be viewed as something safely left to the good sense and desires of the people.

435 U.S., at 625.

Comparison to other states has also been made by the U.S. Supreme Court for the purpose of evaluating the least restrictive means tests. See, e.g., Thomas v. Review Board, 450 U.S. 707, 719 (1981) ["there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position." [Emphasis added.]

To suggest that states cannot or have not created any other type of statutory scheme other than the "unbridled discretion" model employed in Ohio is simply not correct. The vast majority of the

twenty-two other states[5] which have enacted home school legislation have done so after the spate of decisions holding previous statutes void for vagueness. These newer statutes usually create several alternatives which are clear and not left to an official's unbridled discretion in qualifying parents to instruct their children while maintaining the state's interest in education.

It is a straw man to argue that if the Schmidts prevail on First Amendment grounds states will not be able to appropriately regulate home schooling. We simply ask that such regulation comply with the First and Fourteenth Amendments.

---

[5]Home schooling is legal in every state in this country, although only twenty-three states have laws specifically dealing with home schooling. In the other states, home schooling is permitted under the general laws regulating private schooling.

The crucial issue in this case on Free Exercise grounds is the issue of "burden." The Supreme Court of Ohio held that the Schmidts were not burdened because they did not seek approval. We argue that they were burdened because they were convicted of a crime for following the dictates of their religious convictions. This is a classic burden of Free Exercise. Numerous states permit home schooling without requiring religious home schoolers to submit requests to authoritiea with unlimited discretion.

This is a discretionary prior restraint on the free exercise of religion. It is as much a burden on the free exercise of religion as a parallel provision would be in the arena of the freedom of the press. A newspaper which refuses to comply with a vague law which demands that it receive prior approval from a

local official who possesses total discretion to permit or deny publication can certainly raise both vagueness and First Amendment challenges to such a law. This is what we seek to do here.

CONCLUSION

Nothing which has been said by the prosecuting attorney changes the necessity of review by this Court of the decision issued below by the Ohio Supreme Court. As noted by the dissenting judges below, that court failed to follow correctly the clear precedents of this Court with regard to due process and free exercise. We respectfully urge the issuance of a writ of certiorari.

Respectfully submitted,

MICHAEL P. FARRIS
Attorney for Petitioners
Home School Legal Defense Association
731 Walker Road, Suite E-2
Great Falls, Virginia 22066
(703) 759-7577

APPENDIX

IN THE COURT OF APPEALS FOR
KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

In the Matter of: Appeal of Zelda Snyder, Section 3331.08

JUDGMENT ENTRY

Case No. 86-CA-14

Wise, J.

This is an appeal from a judgment entered by the Court of Common Pleas of Knox County, Juvenile Division, overruling the decision of J.S. Short, Knox County Superintendent of Schools (Superintendent), and directing him to excuse from attendance at school the two children of Zelda Snyder (appellee) "for the reason that they are being instructed at home."

Superintendent appeals and argues the following two assignments of error:

I. THE KNOX COUNTY JUVENILE COURT ERRORED (sic) WHEN IT FOUND OHIO REVISED CODE SECTION 3321.04 DID NOT ALLOW THE COUNTY SCHOOL BOARDS/SUPERINTENDENT OF SCHOOLS TO SET MINIMUM STANDARDS FOR THOSE INDIVIDUALS DESIRING TO TEACH CHILDREN AT HOME.

II. THE KNOX COUNTY JUVENILE COURT ERRORED (sic) WHEN IT FOUND OHIO ADMINISTRATIVE CODE SECTION 3301-35-08 DID NOT INCLUDE IN HOME SCHOOLING, AND HENCE FAILED TO SET THE MINIMUM STANDARDS FOR INDIVIDUALS DESIRING TO TEACH THEIR CHILDREN IN THEIR OWN HOMES BY VIRTUE OF SAID IN-HOME SCHOOL BEING A NON-TAX, NON-CHARTERED SCHOOL.

Appellee is the mother of two children of "compulsory school age." See R.C. 3321.01. Appellee requested Superintendent to excuse her children from compulsory attendance at school and to permit her to instruct them at home, pursuant to R.C. 3321.04(A)(2). Appellee presented two reasons for her request: 1) the children's mental condition is such that it is detrimental to the children to be

in a regularly scheduled school program; and, 2) the school's educational curriculum is in direct contrast to the mother's sincerely held religious beliefs. Superintendent denied the request for home instruction. The denial was based upon Superintendent's interpretation of R.C. 3321.04, finding that the children were not "being instructed at home by a person qualified to teach" because Ohio Administrative Code §3301-35-08(D) requires teachers of non-chartered, non-tax supported schools to "have received a bachelor's degree or the equivalent thereof from a recognized college or university," and appellee has no such degree; further, that the proposed home instruction was not in accordance with Knox County Board of Education policy. Pursuant to R.C. 3331.08, appellee appealed to the Knox County Juven-

ile Court.

At this juncture, we wish to extend our compliments to all concerned by favorably quoting the following paragraph from the trial court's opinion.

> First off let me comment that this is a civil case. Most of the cases on this subject are criminal cases brought under Section 3321.28 which provides a criminal sanction. I believe this has caused the opinions in the cases to be of a strained variety in thinking and also to reflect the higher standard of proof required in criminal cases. The cases are sometimes of little value as it is evident that points are being stretched in order to give good people with good intentions every benefit of the doubt rather than invoke a criminal sanction. I compliment the Prosecutor of Knox County and his staff in directing this case to the civil side of the Court. I do believe more thought can be given to what has become a popular matter using the civil forum, and perhaps better solutions obtained.

We also here point out that appellee did not brief the issues in the case at bar as being primarily religious, and

counsel, at oral hearing before this court, agreed that religion was not the primary concern.

On appeal to the Juvenile Court, that court on the basis of Fresh v. Searcy Superintendent of Schools (April 5, 1985), Ashtabula County App. No. 1172, unreported, "chose to remand the matter to the superintendent to comply with Section 2506 of the Revised Code and hold the hearing and furnish the court with the transcript of the proceedings and the record." This having been accomplished, the trial court conducted a hearing on April 21, 1986, and issued his opinion on June 9, 1986. The trial court stated in his opinion at page 5:

> My findings are thus. Section 3321.04 is an improper delegation of legislative power to the Superintendent . . .

Further, at page 6, the trial court

states:

> The denial was based solely on reliance of the Knox County Board of Education Policy. No other consideration was given to the proposal of the applicant or an (sic) determination of reasonableness under the circumstances was made by the Superintendent.
>
> This Court finds itself in the same place the Whisner and Olin Courts found themselves when called to rule upon the qualifications of a non-public school. The Court stated in those two cases that it could not do this absent some regulations to follow. When asked to follow the regulations for the public school the court answered that those regulations do not pertain to non-public schools, or to the educational problem, citing the regulations for a flag pole to be erected. I have been asked here to follow Adm. Code Section 3301-35-08 in regard requests for an excuse for home instruction. As set forth above this section does not apply.
>
> It is to be noted that when the Supreme Court set forth its problem the State School Board did react with the Administrative Code Section, which has eliminated alot (sic) of litigation in the non-public school area.
>
> Until the legislature or the State School Board acts to set standards for home instructions excuse there is very little a Court can do but grant

> appeals. Really the only grounds for denial that could be exercised by the Superintendent in (sic) fraud or insincere application.
>
> Thus I overrule the decision of the Superintendent and direct him to excuse from attendance at a qualified institution the two children of the applicant, by names Quentin Snyder and Gianetta Snyder, for the school year 1985-6 for the reason they are being instructed at home.

We agree with the well-reasoned opinion of the trial court and affirm its judgment for the reasons that follow.

R.C. §3321.03, Compulsory school attendance; exceptions, provides inter alia:

> . . . Every child of compulsory school age shall attend a school or participate in a special education program that conforms to the minimum standards prescribed by the state board of education until the child:
>
> (A) Receives a diploma. . .;
>
> (B) Receives an age and schooling certificate . . .; or
>
> (C) Is excused from school under standards adopted by

> the state board of education pursuant to section 3321.04 of the Revised Code, or if in need of special education, he is excused from such programs pursuant to section 3321.04 of the Revised Code. (Emphasis added.)

R.C. §3321.04 provides inter alia:

> Every parent of any child of compulsory school age who is not employed under an age and schooling certificate must send such child to a school or a special education program that conforms to the minimum standards prescribed by the state board of education, . . .
>
> Excuses from future attendance at or past absence from school or a special education program may be granted for causes, by the authorities, and under the following conditions:
>
> (A) The superintendent of schools . . . may excuse him from attendance for any part of the remainder of the current year upon satisfactory showing of either of the following facts:
>
> (1) That his bodily or mental condition does not per-

mit his attendance at school or a special education program during such period; this fact is certified in writing by a licensed physician or, in the case of a mental condition, by a licensed physician, a licensed psychologist, licensed school psychologist or a certified board psychologist; and provision is made for appropriate instruction of the child, in accordance with Chapter 3323 of the Revised Code;

(2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require. (Emphasis added.)

R.C. §3331.08 provides:

In case a superintendent of schools refuses to excuse a child from attendance at school for one of the reasons stated in section 3321.04 of the Revised Code, or refuses upon request to grant an age and schooling certificate as provided in section 3331.01 of the Revised Code, an appeal may be taken from such decision to the juvenile judge of the county, upon the giving of bond, within ten days there-

> after, to the approval of such judge, to pay the costs of appeal. His decision in the matter shall be final. (Emphasis added.)

Clearly, Ohio's compulsory school attendance law, R.C. §3321.03, requires every child of "compulsory school age" to attend:

1) a school, or;

2) a special education program that conforms to the minimum standards prescribed by the state board of education;

and the child is required to attend such school or special education program until the child:

(A) receives a diploma;

(B) receives an age and schooling certificate,

or

(C) is excused from:

1) school under standards a-

dopted by the state board of education pursuant to section 3321.04.

or

2) the special education program pursuant to §3321.04.

R.C. §3321.03 recognizes two types of education facilities: 1) school; and, 2) special education program. The term "school" in the context of R.C. §3321.03 and R.C. §3321.04 refers to a school chartered by the state pursuant to R.C. §3301.16, State ex rel. Nagle v. Olin (1980), 64 Ohio St. 2d 341, at 351; and the term "special education program" refers to a special education program operated pursuant to state board of education standards and authorized by Chapter 3323, City of Akron v. Lane (1979), 65 Ohio App. 2d 90, at 94-95. Every child is to remain in one or the other of

those until he receives a diploma, receives an age and schooling certificate or is excused.

We read R.C. §3321.03(C) to provide that:

> 1) If the child is to be excused from "school," then even though that excuse is to be pursuant to §3321.04, nevertheless, such excuse must be governed by standards adopted by the state board of education.
>
> 2) If the child is to be excused from "special education program," that is accomplished pursuant to §3321.04.

Now let us look at §3321.04 as it relates to the matter of excuses from attendance.

R.C. §3321.04(A)(1) provides that the superintendent of schools may excuse a child from school or special education program if his bodily or mental condition does not permit attendance at either.

However, the statute mandates that the fact of the bodily condition be certified in writing by a licensed physician, etc. The legislature itself, in §3321.04(A)(1), has established standards for the guidance of the superintendent in judging requests for excuse from school or special education program for the bodily or mentally disabled by requiring for certification of that fact by a physician, etc., and requiring that provision be made for appropriate instruction in accordance with Chapter 3323, Education of handicapped children.

On the other hand, §3321.04(A)(2) simply provides that the superintendent may excuse a child who is "being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the

child may, in the opinion of such superintendent, require." The legislature has provided no standards for the guidance of superintendents in their passing on requests for at home instruction excuses in §3321.04(A)(2). However, we are referred back to the legislative mandate of §3321.03(C), which provides that a child must stay in school until "excused from school under standards adopted by the state board of education" pursuant to §3321.04. The state board of education, apparently in response to State v. Whisner (1976), 47 Ohio St. 2d 181, and State ex rel. Nagle v. Olin, supra, promulgated Ohio Administrative Code 3301-35-08, which deals with the regulation of non-chartered and non-tax supported schools. The state board of education has promulgated no standards in compliance with the dictates of §3321.03(C) as to home teach-

ing which is authorized under §3321.04(A)(2).

We reject Superintendent's contention that "home instruction" should be considered a non-chartered, non-tax supported school and subject to standards promulgated in OAC §3301-35-08. If "home instruction" were a school, then there would be no need for a §3321.04(A)(2) "home instruction" excuse for further school attendance. OAC §3301-35-08-C provides:

> that pupil attendance shall be reported . . . parents shall be responsible for reporting their children's school enrollment or attendance. An individual in charge of the non-chartered, non-tax supported school may, as a matter of convenience, provide the report for the parent.

Thus, it is clear that §3301-35-08 applies to something other than "home instruction." We hold that "being instructed at home by a person qualified to

teacher . . ." as set out in §3321.04(A)(2) is not a school. See City of Akron v. Lane (1979), 65 Ohio App. 2d 90. Therefore, OAC §3301-35-08 is not applicable in determining the standards to be applied to a request for "home instruction," and we overrule Superintendent's second assignment of error.

Having determined that the state board of education has not adopted standards as required by R.C. §3321.03(C) for superintendents to excuse a child from school attendance for the cause "that he is being instructed at home" pursuant to §3321.04(A)(2), may the superintendent himself under the legislative grant of §3321.04 promulgate his own standards?

Superintendent, in the case at bar, adopted rules for excuses from compulsory attendance for more than one school year at a time, requiring that:

> 1) the child suffer from a disability which prevents physical attendance; or
> 2) the parents desire home instruction for religious reasons; or
> 3) an individual holding at least a baccalaureate degree must be on site each day to provide instruction for the child; or
> 4) provide instruction in accordance with course of study approved by the county board of education; or
> 5) provide periodic reports to the home school district; or
> 6) provide assurance and evidence to the home school district that the number of days of instruction and the number of hours per day are not less than required of public school students in a state chartered school.

We agree with the trial court in the case at bar and with the court in Fresh v. Searcy, supra, that there is no requirement under §3321.04 for the Superintendent to inquire into the parent's motive for requesting home instruction. Secular and/or religious oriented requests are within the purview of the statute. As to instructor competency, the statute requirement is only that the

instructor be qualified to teach the subjects "in which instruction is required" but provides no standard to determine what constitutes being qualified to teach one's own children.

We agree with the trial court that §3321.04(A)(2), unlike (A)(1), sets "no guidelines, no limits" and "is too vague to be of any assistance to the Superintendent in the exercise of [his] judgment." The State Board of Education while responding to Whisner and Olin in promulgating standards for non-public schools has not yet seen fit to implement its statutory mandate under the language of §3321.03(C).

Although not briefed nor argued by counsel in the case at bar, we feel constrained to take note of the lack of jurisdiction argument posed by the last sentence of R.C. 3331.08:

> His [the juvenile judge] decision in the matter shall be final.

That issue was raised in Fresh, supra, and two judges (Ford and Dahling) held that that language "does not indicate an express legislative intent to modify the court of appeals (sic) jurisdiction." Judge Cook dissenting stated that the court of appeals "has no jurisdiction to entertain an appeal from the decision of the juvenile judge."

In the Fresh case, the appellate court remanded the case with strong comments as to what law should guide the juvenile judge on remand. We conclude that our opinion, which agrees with the well-reasoned judgment of the trial court, does not require us to rule on whether or not the last sentence of §3331.08 in any way modifies the court of appeals' jurisdiction in this type of

case, and we decline to do so.

In sustaining the judgment of the trial court, we quote from Nagle v. Olin, supra, at 354-355: "Our decision today . . . demonstrates simply that until such time as the State Board of Education adopts minimum standards which go no further than necessary to assure the state's legitimate interest in the education of children" at home, the balance is weighed in favor of "the right of a parent to direct the education, religious or secular, of his or her children." See Whisner, supra, at 213.

We overrule both assignments of error of Superintendent and affirm the judgment of the trial court.

Earle.

E. Wise, J.

Putman, P.J. and Milligan, J. concur.

COURT OF APPEALS

ELEVENTH DISTRICT

ASHTABULA COUNTY (OHIO)

MARK A. FRESH, KAREN A. FRESH, Plaintiffs-Appellants

vs.

W.H. SEARCY, SUPERINTENDENT, ASHTABULA COUNTY SCHOOLS

Case No. 1172

Ford, J.,

By letter dated October 7, 1983, appellants, Mr. and Mrs. Mark Fresh, requested permission from the county supervisor, Mr. William Searcy, to instruct their child, Andrew, at home. On November 8, 1983, a conference was held at the office of the superintendent.

Appellants requested that a transcript of that conference be taken. That request was denied. Appellant, Mark Fresh, taped the proceedings of November 8 on an audio recorder. However, the tape was not complete as it did not include the last ten to fifteen minutes of the discussion which obtained ********* Subsequently the request by the parents to use the tape in lieu of a written transcript was denied by the superintendent. Pursuant to R.C. 3331.08 appellants filed an appeal to the Ashtabula County Court of Common Pleas, Juvenile Division. On February 10, 1984, the decision of the superintendent was upheld by the juvenile court. No transcript of the conference with the superintendent was ever certified to the juvenile court. Neither did the juvenile court accept the proffered tape recording of the conference.

Appellants are parents of Andrew Fresh. Andrew is of compulsory school age pursuant to R.C. 3321.01. Appellants, as "born-again, spirit-field Roman Catholics" prefer to instruct their son at home on religious grounds. Both the superintendent and the juvenile court denied the request for home instruction on the grounds that appellants' religious beliefs were not intruded upon by the state's compulsory school attendance laws.

Appellants in this appeal present five assignments of error.

1. The appellee superintendent erred to the prejudice of the appellants in failing to conduct a full hearing complete with transcript, in consideреing appellants religiously based request for an exemption from

compulsory attendance in order to teach their son at home.

2. The juvenile court erred to the prejudice of the appellants in hearing the appeal without having before it a complete transcript of all the testimony and evidence considered by the appellee superintendent; in refusing to accept appellants' transcript of a tape recording of the November 8, 1983, conference; and in overruling appellants' requests for the court to hear additional testimony and evidence in the appeal hearing.

3. The juvenile court erred to the prejudice of the appellants by considering matters not part of the transcript and not offered as evidence by either party.

4. The juvenile court erred to the prejudice of the appellants in fail-

ing to find that the decision of the appellee superintendent was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record, and in failing to reverse or vacate said decision of appellee.

5. The juvenile court erred to the prejudice of the appellants by exceeding its authority and statutory jurisdiction by ordering the appellants' child to "forthwith be entered into school, either public, private or parochial that meets the state requirement of compulsory school attendance," in the context of an appeal under R.C. 3331.08 and R.C. Chapter 2506.

Appellants first, second, and third

assignments of error are addressed together as each attacks the hearing at the superintendent and juvenile court levels on procedural grounds. The assigned errors are well taken. R.C. 2506.01 reads in pertinent part:

> "Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.04, inclusive of the Revised Code.
>
> The appeal provided in sections 2506-.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law."

An adjudication includes an order which constitutes a determination of rights, responsibilities and legal relationships

of individuals. R.C. 2506.01. An initial determination and review of the home instruction issue under R.C. 3321.04 and 3331.08 are clearly adjudicatory in nature as the rights of various individuals are affected by the ultimate decision. Chapter 2506 does permit an appeal of such a final adjudicatory decision of an officer of any political subdivision of the state. See Burks v. Perk (1972), 6th Circuit (470 Fed. 2d 163). The decision of the superintendent under R.C. 3321.04 does fall within the contemplation of R.C. 2506.

As the statutory provisions cited are applicable, the present case presents significant procedural shortcomings. Neither a transcript nor a statement of facts were included in the record certified to the juvenile court as required although one was requested by appellants.

R.C. 2506.02; 2506.03. Without such a transcript at the superintendent's level, the juvenile court has no basis upon which to permit the introduction of evidence; nor does the court have the authority to proceed with the appeal. In re Locke (1972), 33 Ohio App. 2d 177. Thus, the assignments of error one, two, and three are sustained. The decision of the juvenile court must be reversed and remanded to the superintendent for proceedings in accordance with the Chapter 2506 procedural provisions.

Appellants in the fourth assignment of error apparently argue two issues. First, they maintain that the superintendent's refusal to permit home instruction violates their constitutional rights under the first and fourteenth amendments. Secondly, the appellants contend that the decision is against the manifest

weight of the evidence. We disagree as to both contentions.

Appellants do not attack nor do we re-examine the state's authority to establish compulsory school attendance laws. See, Parr v. State (1927), 117 Ohio St. 23. Neither is there any doubt as to the power of the state to impose reasonable regulations for the control and duration of basic education. See, Pierce v. Society of Sisters (1925), 268 U.S. 510. However, the United States Supreme Court, as well as our own state supreme court, have concluded that "the state's interest in universal education *** is not totally free from a balancing process when it impinges in fundamental rights *** such as those specifically protected by the *** first amendment, and the traditional interests of parents with respect to the religious upbringing of

their children ***." Wisconsin v. Yoder (1972), 406 U.S. 205, at 214; State v. Whisner (1976), 47 Ohio St. 2d 181; State, ex re. Nagle v. Olin (1980), 64 Ohio St. 2d 341. To ensure that state attendance laws do not interfere with the parental right under the first amendment, the established requirements cannot deny the free exercise of religious beliefs. Yoder, supra. In addition, the court in Whisner, supra, elaborated on parental rights in terms of due process under the fourteenth amendment.

> "[In Farrington, Pierce, and Meyer] the court utilized the 'liberty' concept embodied within the due process clause of the fourteenth amendment to invalidate legislation that interfer with the right of a parent to direct the education, religious or secular, of his or her children. Thus, it has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a 'fundamental right' guaranteed by the due process clause of the fourteenth amendment." Whisner,

supra, at 213, 214.

Thus, both the first amendment's free exercise clause and the due process of the fourteenth amendment serve to protect the traditional and constitutional right of parents to direct their child's educational needs within the limitations imposed by the state.

An examination of Ohio's statutes is necessary to determine if Ohio's home instruction laws comply in terms of constitutionality. R.C. 3321.04 explicitly state the circumstances under which home instruction is permitted and compulsory attendance is excused.

> "(A) The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:
>
> (1) That his bodily or mental condition does not permit his attendance

> at school or a special education program during such period; ***
>
> (2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require.
>
> R.C. 3321.04 (A).

Strict adherence to the statutory requirements is mandated. See, Akron v. Lane (1979), 65 Ohio App. 2d 90. There is no requirement under R.C. 3321.04 for the superintendent or the courts to examine a parent's motives for requesting home instruction. Religious oriented requests, as well as secular, are within the contemplation of the statute. Any reliance on the Whisner three-prong test is misplaced. Once it is established that the curriculum contemplates reasonable educational standards, and the instructor is competenet to teach those

subjects, home instruction is permitted. R.C. 3321.04 and 3331.08 comport with the limitations imposed through the first and fourteenth amendment on the state's "interest in universal education." Thus, the statutes are constitutionally sound, as parental rights in terms of due process and the free exercise of religious beliefs are protected. Yoder, supra; Whisner, supra.

The instructor competency requirement in R.C. 3321.04 merits comment at this juncture. The only requirement imposed by the above cited statute is that the instructor be qualified to teach the various topics in a primary education curriculum. Competence to teach does not imply a requirement of certification. Strict adherence to the statute, as mandated by Lane, supra, supports this rationale. Case authority in either juris-

dictions and commentaries on home instruction legislation corroborate this interpretation. 8 Univ. of Dayton L. Rev. 1 (1982); See, also, State v. Massa (1967), 95 N.J. Super. 382, 231 A. 2d 252; Commonwealthv. Roberts (1893), 159 Mass. 372, 34 N.E. 402; Perchemlides v. Frizzle (1978), Mass. Super. Ct. Unreported Case No. 16641.

Appellants have also maintained that the decision of the juvenile court is against the manifest weight of the evidence. We disgree.

Whether a specific home instruction program in in compliance with the requirements of R.C. 3321.04 is a factual question within the discretion of the superintendent. Lane, supra. Appellants have not presented any evidence to show that the instructor in their home instructions program is competent. While

Mrs. Fresh does have a degree in primary education, this alone is insufficient. There is no indication of what subjects would be taught or any evidence as to the competency to teach those subjects. Any resubmissions to the superintendent on remand should include a more thorough analysis of curriculum and a more detailed explanation as to the instructor's qualification. Thus, the decision based on the record before the juvenile court at that time ws not against the manifest weight of the evidence.

Appellants fifth assignment of error is also well taken. R.C. 3331.08 permits an appeal to the juvenile court from the superintendent's refusal to excuse a child from school attendance under R.C. 3321.04 criteria. The superintendent's authority under R.C. 3321.04 is limited to the denial of a parental request to

instruct a child at home. There is no authority under the statute to order a child's enrollment in school. Rather, the compulsory school attendance law is enforced through separate proceedings pursuant to sections 3321.18 through 3321.99 of the Ohio Revised Code. In fact, proceedings to ensure Andrew's compliance with compulsory school attendance are being continued pending the outcome of the present appeal. Thus, the juvenile court did exceed its jurisdictional authority in its order requiring Andrew's immediate enrollment in school. Enforcement of compulsory attendance remains with the pending proceedings.

In addition to the assignments of error presented by appellant, comment on a jurisdictional issue is merited. R.C. 3331.08 reads in part:

"In case a superintendent of schools

> refuses to excuse a child from attendance at school for one of the reasons stated in Section 3321.04 of the Revised Code, *** an appeal may be taken from such decision to the juvenile judge of the county, ***. His decision in the matter shall be final." (Emphasis added).

Ohio courts have repeatedly stated that there is no inherent right of appeal from a judgment of a court, and that such right must be conferred by constitution or statute. See, Middletown v. City Commissioners of Middletown (1941), 138 Ohio St. 596; In re Mahoning Valley Sanitary District (1954), 161 Ohio St. 259, certiorari denied, 348 U.S. 831. Article IV Section 3, of the Ohio Constitution reads:

> "The courts of appeal shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be providedby law, to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of

appeals within the district, ***."

This constitutional passage empowers the General Assembly to change the appellate jurisdiction of the court of appeals if is should desire to do so; and unless there is such legislative action, that appellate jurisdiction of the court of appeals remains. Youngstown Municipal RY. Co. v. Youngstown (1946), 147 Ohio St. 221. Thus, it is within the legislative province to specify which final orders are appealable, and those orders remain appealable until the General Assembly acts to modify the jurisdiction of the court of appeals. Cincinnati Gas and Electric Co. v. Pope (1978), 54 Ohio St. 2d 12.

However, the wording of R.D. 3331.08 does not indicate an express legislative intent to modify the court of appeals jurisdiction. We have utilized general

rules of statutory construction to reach this conclusion. Under these rules, R.C. 3331.08 is "a special statute" because it is designed for a particular purpose and covers a particular subject matter. R.C. 2505.02 provides a definition of a final appealable order.

> "*** An order affecting a substantial right made in a special proceeding *** is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial."

It may be argued that the latter special statute, R.C. 3331.08 has become an exception to those final orders under R.C. 2505.02. However, the rules of statutory constructions provide that where a general provision conflicts with a special provision, they should be construed if possible to that effect is given to both. R.C. 1.51. In addition, statutes providing for appeals, and for limitations on the right of appeal should be given a

liberal interpretation in favor of a right to appeal. Van Meter v. Segal-Schadel Co. (1966), 5 Ohio St. 2d 185. As the language of R.C. 3331.08 is not an express repeal of a litigant's right to appeal a decision of an inferior court to a court of appeals under the Ohio Constitution and R.C. 2505.02, we conclude that there is no legislative intent to abrogate appellant's right of appeal to this court under R.C. 3331.08.

As discussed above, R.C. 3321.04 and 3331.08 are constitutionally sound under both the first and fourteenth amendments. Thus, assignment of error four is without merit. However, assignments of error one, two, three, and five are well taken. On this basis, the judgment of the court is reversed and remanded for further proceedings in compliance with the procedural requirements of Chapter 2506.

Judge Donald R. Ford

Dahling, P.J., concurs

Cook, J., dissents with dissenting opinion.[1]

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[1]Dissenting opinion not included in this appendix.

"On Advice of Counsel"

Robert T. Baker, BASA Legal Counsel

GETTING A HANDLE ON HOME INSTRUCTION

Based on a completely non-scientific survey of inquiries from school districts over the last few years, it is my conclusion that the number of parents who are attempting to educate their children at home is definitely on the increase. This development would appear to be related to increased "activism" among fundamentalist religious groups. There also seems to have been a proliferation of "mail-order" academies offering instructional programs to these parents, which

may have encouraged some of them to attempt home instruction.

Whatever the cause, home instruction requests are with us and must be dealt with by school administrators -- namely, school superintendents. In the past, superintendents facing these requests have had little to guide them, particularly where religious issues were involved. In fact, it was unclear to many superintendents whether they had any authority at all to turn down a home instruction request where religious reasons were given for the request. Now, in a recent decision, the Ohio Supreme Court has answered this very basic question, which should help Ohio superintendents to "get a handle" on the home instruction phenomenon.

THE BIG PICTURE

Under Ohio's legal framework, home instruction questions must be dealt with in the context of the compulsory attendance laws. Ohio's compulsory attendance law (ORC Chapter 3321) is a set of quasi-criminal statutes which generally require all parents of school-age children (6-18) to send their children to school. Special excuses from compulsory education may be obtained from the superintendent where (1) the child's physical or mental condition make it impossible for him to attend or (2) the child is receiving instruction at home

> by a person qualified to teach the branches in which instruction is required, and such additional branches as the advancement and needs of the child may, in the opinion of the superintendent, require. ORC §3321.04(A)(2).

This language is obviously far from clear. But what has been even less clear is how far a superintendent must "bend"

when a parent claims that he is seeking home instruction on religious grounds. In the late 1970's, the Ohio Supreme Court twice ruled in favor of parents who were sending their children to religious schools which did not meet state minimum standards. Apparently deferring to these decisions, the Attorney General issued an opinion stating that where a home instruction request is based on truly-held religious beliefs, the compulsory attendance law must yield to such beliefs. 1979 OAG No. 056.

THE SCHMIDT CASE

The Schmidts of Columbiana County took this last concept just a little bit too far. The Schmidts were "born-again Christians" who believed, on religious grounds, that it was their duty to educate their children at home. They refused to apply for home instruction and

enrolled their children in a non-chartered correspondence school. When the school filed charges, the parents defended on two theories: (1) that requiring them to obtain approval for their home instruction program would infringe upon their First Amendment right to the free exercise of their religion, and (2) that the Ohio law gave so much discretion to local superintendents that it amounted to an unlawful delegation of legislative authority.

A VOTE OF CONFIDENCE FOR SUPERINTENDENTS

The Ohio Supreme Court rejected both of these arguments. (The first citation is State v. Schmidt, 29 Ohio St. 3d 32 [March 25, 1987].) First, the Court said that it would not speculate as to whether the superintendent's decision, whatever it might have been, would infringe upon the parent's religious freedom. Second,

the court affirmed the discretionary authority vested in school superintendents to determine whether home instruction programs presented by parents will be adequate, noting that such decisions could always be appealed to the juvenile court (ORC §3331.08).

SOME OBSERVATIONS

The Schmidt decision clearly establishes that parents seeking home instruction must work with the local superintendent to obtain approval for their proposed program. Such parents can no longer assume that, because their desire for home instruction is religious-based, they can ignore the compulsory attendance laws.

At the same time, it is important to recognize what the Schmidt case does not do. It does not help school superintendents decide what is an acceptable home

instruction program, or what a "qualified" instructor is. Nor does the Schmidt case tell a superintendent how far he can go before he will be deemed to have "infringed" the parents' constitutional rights. In view of these uncertainties, I would counsel superintendents to make accomodations wherever possible on home instruction requests, and to avoid over-rigorous requirements which could be viewed as contrary to the spirit of the home instruction law or an infringement upon the parents' freedom of religion.